Office-Supreme Court, U.S.
FILED
JUL 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 85-172

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANTHONY B. CATALDO,

Petitioner,

v.

HON. THOMAS J. MESKILL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND CIRCUIT

ANTHONY B. CATALDO
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189

1. QUESTIONS PRESENTED

1. Wasn't constitutional due process applicable to the inquiry raised by the complaint and the petition to review the dismissal of the complaint.

2. Wasn't the dismissal of the complaint and the petition, a violation of constitutional due process by failing to assess the facts of the case and to apply the law appropriate to those facts.

3. Wasn't Judge Meskill required to disqualify himself by Vol. 28 U.S.C. Section 455(a) if by making the decision he made he showed that his impartiality could have been reasonably questioned, or as stated in (b) of said Section 455, he showed he had a personal bias and prejudice concerning a party and consequently he erred

in not disqualifying himself.

4. Wasn't the Chief Judge of the Second Circuit Court of Appeals in error, in failing to find from the facts in the complaint that JUDGE MESKILL had engaged in conduct prejudicial to the Appellant's cause and the effective and expeditious administration of the business of the Court or to conclude such proceedings and find that appropriate corrective action should have been taken.

5. Doesn't 28 U.S.C. 372(c) provide a proper vehicle for plaintiff to review and correct the plaintiff's losses suffered by the denial of JUDGE MESKILL to correct the unlawful action of the Courts below on the appeals before him.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANTHONY B. CATALDO,

Petitioner,

v.

HON. THOMAS J. MESKILL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND CIRCUIT

Petitioner, ANTHONY B. CATALDO, respectfully prays that a Writ of Certiorari issue to review the judgments and orders of the Court of Appeals, Second Circuit, dated March 12, 1985 in a proceeding in JUDICIAL COUNCIL OF THE SECOND CIRCUIT entitled "IN RE: CHARGE OF JUDICIAL MISCONDUCT" against the Honorable THOMAS J. MESKILL, in a special proceeding under

28 U.S.C., Section 372(c) and Local Rule Section 0.24, of the Rules of the Circuit Court, Second ~~Department~~ CIRCUIT.

I. QUESTIONS PRESENTED

1. Wasn't constitutional due process applicable to the inquiry raised by the complaint and the petition to review the dismissal of the complaint.

2. Wasn't the dismissal of the complaint and the petition, a violation of constitutional due process by failing to assess the facts of the case and to apply the law appropriate to those facts.

3. Wasn't Judge Meskill required to disqualify himself by Vol. 28 U.S.C Section 455(a) if by making the decision he made he showed that his impartiality could have been reasonably questioned, or as stated in (b) of said Section 455, he showed he had a personal bias and prejudice concerning a party and consequently he erred

in not disqualifying himself.

4. Wasn't the Chief Judge of the Second Circuit Court of Appeals in error, in failing to find from the facts in the complaint that JUDGE MESKILL had engaged in conduct prejudicial to the Appellant's cause and the effective and expeditious administration of the business of the Court or to conclude such proceedings and find that appropriate corrective action should have been taken.

5. Doesn't 28 U.S.C. 372(c) provide a proper vehicle for plaintiff to review and correct the plaintiff's losses suffered by the denial of JUDGE MESKILL to correct the unlawful action of the Courts below on the appeals before him.

II. PARTIES BELOW

The names of all parties in the Complaint and the Petition to Review the Decision filed in the Circuit Court of Appeals, Second Circuit, are shown in the

caption of those two papers. The names of the parties in the suits on two appeals are, as set forth in the caption in each of those matters, viz.:

In the cargo damage suit, the parties as set forth in the complaint filed in the District Court under no. 78-3041(RWS), M.W. ZACK METAL CO. v. INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS H. JANSEN, JURGEN N. KRAFFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED.

In the Civil Rights suit, the parties are as set forth in the complaint filed in the District Court under no. Civ. 83-3984 (CPS), ANTHONY B. CATALDO, Plaintiff v. LOUIS D. LAURINO, ROCCO LUONGO, JOHN DE VITO, ANNE NOBILETTI, MICHAEL S. NOBILETTI, JOHN NOBILETTI, FRANK NOBILETTI, ESTATE OF PEARL S. SHERBURNE*, also known as PEARL S. WELLS, deceased, THE SURROGATE'S COURT OF

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* not served with process

QUEENS COUNTY*, THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS*, THE APPELLATE DIVISION OF THE SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK* and "JOHN DOE"*, the name "JOHN DOE" being fictitious and intended to describe the law assistant of the Appellate Division, Second Department, who made the report of the Records on Appeal filed in said Court in respect of the Estate of Pearl S. Sherburne, also known as Pearl S. Wells, deceased, to the panel of Judges in the Appellate Division, Defendants.

III. OPINIONS BELOW

The Opinion of the Chief Judge denying the complaint filed in the Charge of Judicial Misconduct proceedings, is dated March 12, 1985. The petition to review that denial is dated April 9, 1985. The decisions themselves are the opinions and decisions made. Subsequently, on applications to

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* not served with process

clarify the finality of those decisions for the purpose of this appeal, two other decisions and orders ~~she~~ were made by the court and the first is dated June 11 and the second dated July 1, 1985.

IV. A CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). Said section reads as follows:

Section 1254 - Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

V. JURISDICTIONAL STATEMENT

The statutory provisions conferring jurisdiction on this Court are the Constitution of the United States and 28 U.S.C. Section 372(c).

The constitutional provision is Amendment V stating in pertinent parts, Amend. 5, "due process of law...nor be deprived of life, liberty, or property without due process of law; ***" and 28 U.S.C. Section 372(c) states:

> "(c)(1) Any person alleging that circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts***may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct,***and conclude the proceeding if he finds that appropriate corrective action has been taken."

In filing a complaint as stated in Section 372(c) of 26 U.S.C., and the Petition for review when that complaint was dismissed, both those decisions in the Court of Appeals failed to apply due process to both complaint and petition. The complaint is a complaint that Judge Meskill had denied due process and otherwise shown partiality and prejudice in making the decisions in those appeals.

This plaintiff was struck with a similarity of approaches in both decisions of the Court of Appeals, showing a mind predisposed to partiality and biases. As a federal court judge is required to disqualify himself under Sections 455 of 28 U.S.C. if he is subject to bias or is one who cannot be impartial to the facts of this case; a complaint was filed under Section 372(c) detailing facts in depth and many citations to cases in support of disqualification and yet the Court of Appeals refused to accord due process to it, and permission to do so was a consitutional violation to be reviewed by this court. The petition to review that dismissal of the complaint was a repeat of the fact that plaintiff made a great effort to indicate a need to apply due process but the Court of Appeals decision was a resort to immaterial matters and it, too, failed to apply due process of law. As a matter of fact, the action of the Court of Appeals

is part of the action of the courts in refusing to obey the constitutional demand to apply due process and it shows a need for establishing that rule of law by their statement of law.

VI. A CONCISE STATEMENT OF THE CASE

This plaintiff has been meeting with much opposition from the courts to prove that a violation of the Federal Constitution occurs when a trial court, state or federal, makes a decision against the true facts of the case and the appropriate law. In proof of this statement, see the Petitioner article; published in the New York Law Journal on April 9, 1985 at page 3, which is an article written by counsel for petitioner. Also the decisions under review on this appeal are prime examples of the avoidance of constitutional due process by the Court of Appeals. Why this should be is unknown. The problem is a pervasive

one and it should be clarified in this Court. If it cannot be done on the civil side of this court, then Sections 241 and 242 of title 18 U.S.C. should be utilized and not be ignored by the Justice Department.

In this case, the Chief Judge of the Court of Appeals, whom we believe to be bound by the statute 28 U.S.C. Section 372(c), should have made a lawful decision on the question of whether Judge Meskill has engaged in conduct prejudicial to the effective and expeditious administration of the business of the Courts. Also, Section 372(c) says in (3)(B) that the chief judge may conclude the proceedings if he "finds that appropriate corrective action has been taken".

In this case, Judge Meskill had not taken any corrective measures whatever in the proceedings instituted under Section 372(c). Reading the complaint shows that there was corrective action to be taken for plainly the plaintiff had stated the

constitutional violations in his complaint in full and in depth, showing the violation of due process, corrections of which would mean the restoration of what the law allowed under the facts according to due process. But, the chief judge, instead, put in pusilanimous words to affirm what was a total failure of the true and effective need of Justice, viz; what Section 372(c) allows.

A decision on the true facts would have required the Court of Appeals issuing a written complaint stating the conduct of Judge Meskill that needed the review as stated in the last sentence of (c)(1). The complaint states the fact that the actions of the judge in not accepting the plaintiff's claim to facts were a denial of due process.

It bears repeating that Section (c) states that the chief judge was required to file with the Clerk of the Court of Appeals a written complaint containing the facts of the case if, a person's complaint alleges that a judge has "engaged in conduct prejudicial to the

effective and expeditious administration of the business of the court". He did not do that. He, instead, refused to follow the plain meaning of the statutory law. This is a basic constitutional violation. The explanations he states for his decision are not stated as exemptions under the positive statement of the law of the statute. He could not make any excuses for not following the law. That makes the plaintiff entitled to the positive commands of the statute. The court could not contradict the statute and its failure to provide the remedies stated by the statute to the plaintiff were wrongfully denied, despite due process.

At page 2 of his decision, the chief judge shows the extent of his personal predilections as to how he was to read Section 372(c). But what he says is not proper interpretation of this statute for as shown above, he fails to state that the statute grants the appellant a review if the judge is biased or prejudiced against the interests

of the appellant, and also, he may not act contrary to the command that he be impartial.

The honorable chief justice persisted in violating due process plainly avoiding the remedial provisions of Section 372(c).

Also, the Petition to review the decision of the chief judge was treated in the same peremptory manner of not reviewing the decision for the necessary loss of property rights to the plaintiff but by avoiding of the issue raised by repeating that review was denied for the reasons stated in the decision that needed reviewing. The complainant was entitled to relief if due process was not followed. Plaintiff fought hard to make that point loud and clear but the chief judge simply used his power to say otherwise, and this power was not due process of law at all.

The complaint and the petition to review the decision on the complaint are attached to the appendix as required by the rules of this court. See pp. A11-A83 of the Appendix.

Part of the jurisdictional statement above stated is the fact that the federal Court of Appeals has decided important questions of federal law which have not been but should be settled by this court, yet they have decided a federal question in a way in conflict with the applicable decisions of the courts as it was stated in the complaint in the Judicial Misconduct Proceedings.

It is respectfully submitted that if there were ever a case that had denied due process as required by the Constitution, this was it, as all decisions in the District Court and the Court of Appeals are subjected to that single error which nullified and voided all decisions rendered in this case against the appellant and the clients.

The cases of MARBURY v. MADISON, I, CRANCH, 137, 179; COHENS v. VIRGINIA, 19 U.S. 264, 403, 405 and 414; and THE ATLAS CREDIT COMPANY v. EZRINE, 25 N.Y.(2), 219, are cases which are clearly and decisively unconstitutional

decisions of the courts and consequently null and void.

COHENS v. VIRGINIA, especially, says at 414: "The Constitution and laws of the state so far as they are repugnant to the Constitution and laws of the U.S. are absolutely void." The word "void" is used in its natural sense. There can be no denying that such decisions are nullities, nor should there be any quibble about what the words null and void mean. It is being used by this plaintiff as meaning that there has been no dispositive power exercised of the issues at all, also, that the rules of res judicata do not follow but such decisions are subject to be set aside upon proof of their unconstitutionality. Refusing to vacate such a decision is itself a denial to apply the appropriate law, which is unconstitutional. There are no exceptions to the rule, nor is anyone exempt from the rule.

The Supreme Court in U.S. v. LEE, 106 U.S. at p. 220, that no one is above the

Constitution. Such strictures are made because of the importance of maintaining the principle that unconstitutional acts of the Judiciary are null and void. That is and should be the prime concern of all courts.

This plaintiff has found many courts, one even tried to hold this attorney for contempt, for insisting on the court accepting counsel's statement of this principle of law for his acceptance.

It is respectfully hoped that this court will re-examine this question of the extent of the nullification of a court decision violating constitutional due process. The law is stated in the complaint in The Judicial Misconduct Proceedings.

It is specifically necessary to say here that the decision of the Court of Appeals on the review of the Judicial Misconduct Proceedings, as stated in its decision of July 1, 1985 (see p. A-10) that this court may not review the actions of the Court of Appeals

is not only not correct, but it is void if read that way. The Court of Appeals would have Section 372(c) be free of the constitutional provisons of due process even though due process is a necessary element of every decision made by the courts of this country. That cannot be. That interpretation would also contradict the constitutional provisions allowing all decisions of the Court of Appeals to be reviewed by writ of certiorari. Again, we find a court requiring us to accept unconstitutional decisions on a claim that can be supported only by a violation of the Constitution. This court has said that Congress may not legislate what is due process. This is an important question for this court to decide whether the Court of Appeals' interpretation of Section 372(c) is proper or unconstitutional.

VII. CONCLUSION

It is respectfully submitted that this court examine the complaint by plaintiff under Section 372(c). Note the failure of the Court of Appeals to apply constitutional

due process to the facts and law and to direct that the decisions made by Judge Meskill in both appeals which had been submitted to him as a judge of the Court of Appeals, require new decisions under Section 372(c), applying due process by the Constitution. This court by using the plenary power of the court should grant summary judgment to the plaintiff to do what Judge Meskill should have done under the laws of the land.

Respectfully submitted,

Anthony B. Cataldo

Anthony B. Cataldo

APPENDIX

STATEMENTS REQUIRED BY RULE 21(1)(d)

The federal jurisdiction in the District Court in the cargo damage claim case is 28 U.S.C. Section 1333(1), and in the Civil Rights case, it is 42 U.S.C. Sections 1983 and 1985.

The official reports of the decisions in the District Court in the cargo damage claim ~~is~~ were not officially reported. They are reproduced here at pp. 2, 102 and 104. and the decision of the Circuit Court of Appeals is reported at 675 f.(2) 525.

The decisions of the District Court in the Civil Rights suit ~~is~~ were not officially reported, ~~at~~ They are reproduced here at pp. 134 and 160, but the decision of the Court of Appeals in that case was not officially reported. It is reproduced here at P.A. 88

STATUTES

United States Code, Title 28, Section 2106

Section 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decrees, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgement, decrees, or order, or require such further proceedings to be had as may be just under the circumstances.

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV

Section 1, * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIVIL PRACTICE LAW AND RULES OF NEW YORK

Section 104. Construction

The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceedings. * * *

JUDICIARY LAW

ATTORNEYS AND COUNSEL

Section 487. Misconduct by attorneys

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he had not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

FINAL DECISION OF
COURT OF APPEALS DATED
MARCH 12, 1985 DISMISSING
COMPLAINT

JUDICIAL COUNCIL OF
SECOND CIRCUIT

Stamped U.S. Court of Appeals, 2nd Circuit, filed March 12, 1985, Elaine B. Goldsmith, Clerk.

----------X

In re

CHARGE OF JUDICIAL MISCONDUCT 85-8501

----------X

WILFRED FEINBERG, Chief Judge:

On February 25, 1985, complainant filed a complaint with the Clerk pursuant to 28 U.S.C. Section 372(c)(1) and Local Rule Section 0.24(a), charging a judge of the Court of Appeals of this circuit (the judge) with judicial misconduct. Complainant charges that in two decisions written by the judge he made "arbitrary" and "unjustified" decisions that "failed to deal with the true facts of the case and the applicable law." Complainant alleges that the decisions "disregarded [complainant's] case."

Complainant's allegations relate to two appeals heard by panels presided over by the

judge, each of which resulted in an affirmance of the lower court decision. It is clear from this lengthy and repetitious complaint that complainant is under the mistaken impression that the Judicial Councils Reform and Judicial Conduct and Disability Act (the Act), 28 U.S.C. Section 372(c), may be used as an avenue of appellate review. He appears to regard the Act as a circuit court version of 28 U.S.C. Sec. 144, which permits a party to file an affidavit of bias in an effort to seek the recusal of a district judge. Complainant also concludes his papers with the request that "This court ... award [ ] the plaintiff a correction of [the judge's] actions by setting aside or vacating the decisions and granting plaintiff the right to move the courts to rectify the loss of their rights."

All of complainant's allegations, including the claim that the judge was biased against his cases, are "directly related to the merits of a decision or procedural ruling," 28 U.S.C. Sec. 372(c)(3)(ii), and thus inappropriate for review under the Act, which does not apply to questions

that have been, or may be, adjudicated through normal litigation procedures. If what is sought is appropriately obtained by normal adjudication, rather than by a misconduct complaint, see In re Charge of Judicial Misconduct, 685 F.2d 1226 (9th Cir. 1982), such a matter falls within clause (ii) of Sec. 372(c)(3)(A), whether or not it has already been the subject of a judicial ruling. The procedures of the Act were not meant to apply to conduct that can be redressed through legal proceedings unless the conduct alleged is egregious or clearly prejudicial to the administration of justice, see In re Charge of Judicial Misconduct, 593 F.2d 879, 881 (9th Cir. 1979), which is not the case here.

Therefore, the complaint is dismissed as directly related to the merits of a decision or procedural ruling pursuant to 28 U.S.C. Sec. 372 (c)(3)(A)(ii) and Local Rule Sec. 0.24(b).

It is further ordered that the Clerk be directed to transmit copies of this order to the complainant and to the judge whose conduct is

the subject of the complaint.

WILFRED FEINBERG
Chief Judge

Dated: New York, NY
March 12, 1985

ORDER OF COURT OF APPEALS
DATED APRIL 9, 1985 DENYING
REVIEW OF DENIAL OF COMPLAINT

JUDICIAL COUNCIL OF
THE SECOND CIRCUIT

Stamped U.S. Court of Appeals, 2nd Circuit, filed 4/9/85, Elaine B. Goldsmith, Clerk.

----------X

In Re
CHARGE OF JUDICIAL MISCONDUCT

----------X No. 85-8501

Before the Judicial Council of the Second Circuit:

A complaint filed on January 21, 1985, alleging misconduct on the part of a circuit court judge of this circuit having been dismissed on March 12, 1985 by the chief judge of the circuit, and a petition for review having been filed on March 20, 1985,

Upon consideration thereof by the Council, it is

ORDERED that the petition for review is DENIED for the reasons stated in the order dated March 12, 1985.

The judicial counsel member who is the subject of this complaint took no part in this determination.

The clerk is directed to transmit copies of this order to the complainant and to the judge whose conduct is the subject of the underlying complaint.

Steven Flanders,
Circuit Executive
by Direction of the
Judicial Council

Dated: New York, NY
April 9, 1985

ORDER OF COURT OF APPEALS DATED JUNE 11, 1985 REJECTING NOTICE OF APPEAL

United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York 10007

Elaine B. Goldsmith
Clerk

June 11, 1985

Anthony B. Cataldo, Esq.
53 Park Place
New York, NY 10007

Re: Judicial Misconduct Proceedings
85-8501

Dear Mr. Cataldo:

This will respond to your letter of May 24, 1985, addressed to Ms. Deborah Gottlieb.

During your telephone conversation with Ms. Gottlieb you inquired about the procedures for appeal provided by 28 U.S.C. Sec. 372(c) and she answered accordingly. You are, of course free to pursue the matter further, as you wish.

Very truly yours,

Elaine B. Goldsmith,
Clerk

EBG:cbs

ORDER OF COURT OF APPEALS
DATED JULY 1, 1985 REJECTION
OF NOTICE OF APPEAL

United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York 10007

Elaine B. Goldsmith
Clerk

July 1, 1985

Mr. Anthony B. Cataldo
53 Park Place
New York, New York 10007

Re: Judicial Conduct
Complaint
No. 85-8501

Dear Mr. Cataldo:

This will acknowledge receipt of your documents entitled "Notice of Appeal" dated, June 23, 1985, received in this office on June 26, 1985.

The document has been filed under the above docket number. I wish, however, to advise you again that the judicial conduct statute and our local rules provide that action of the Judicial Council on a petition for review of an order of the Chief Judge "shall be final and conclusive and shall not be judicially reviewable on appeal

or otherwise." 28 U.S.C. Sec. 372(C)(10); Local Rule Sec. 0.24(e). Please be advised, that no action will be taken by this court regarding these documents, as it is the responsibility of the party seeking Supreme Court review to pursue the matter directly with that court.

Sincerely,

ELAINE B. GOLDSMITH, Clerk
By

Deborah H. Gottlieb,
Deputy Clerk

COMPLAINT IN
JUDICIAL MISCONDUCT
PROCEEDINGS

Law Offices
ANTHONY B. CATALDO
53 Park Place
New York, N.Y. 10007

962-0965

Cables: Lawsabcat

December 11, 1984

Hon. Wilfred Feinberg
Chief Justice of the
U.S. Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Hon. Thomas J. Meskill

Honorable Sir:

I have been subjected to a series of decisions by Hon. Thomas J. Meskill, Circuit Court Judge in the Second Circuit, that I am impelled to write this letter. I have tried as hard as I could to compose my extrme disappointments on the loss of large sums of money by decisions inspired and made by Judge Meskill and have found it impossible to rationalize to find them normal decisions in view of the facts of this case. I kept recurring to the conclusion that they were arbitrary decisions as well as unjustified, for they failed to deal with the true facts of the case and the applicable law.

As a matter of fact, one of the cases involved the loss of my constitutional rights in the Surrogate's Court of Queens County by arbitrary decisions and conduct by the Surrogate, who has been following that pattern of action since 1966 when we both represented a Mr. William Welsh who, at thetime, was the executor of his brother Richard Welsh's estate in the Surrogate's Court of Nassau County. Mr. Laurino was not a judge at the time.

In 1966, the then Mr. Louis D. Laurino, and now the Surrogate of Queens County, let his feelings of ill will against me be expressed in an attack upon my person at the luncheon recess in the courthouse in Mineola. After that he became Surrogate and in the several cases that I had to present to him as Surrogate for my clients, he denied in arbitrary and unlawful manner and he did so to avenge his own feelings of hatred against me.

But, I have no personal dealings with Judge Meskill and so I approached my matters that came before him expecting him to examine the facts and the law and decide accordingly.

The first time I dealt with Judge Meskill was in an admiralty suit involving the M.W. Zack Metal Company of Detroit, Michigan. The second time was in my civil rights case against Surrogate Laurino and others associated with him in those decisions. There is one thing in common that occurred in both suits. They both involved motions which dismissed the complaint on a Rule 12(b) motion. The complaints were dismissed and

I had appealed because there were many issues of fact raised in each case. The decisions were written by Judge Meskill and he disregarded my factual claims both times. Thus, he acted contrary to the facts and ignored the appropriate law that was submitted. The kind of decision is basically unconstitutional as denying due process and the equal protection of the law as prohibited by the Fourteenth Amendment. He made eight decisions in the two matters and each bore the same stamp of impatience and disdain for the matters which I had presented. I believed that those facts presented were sufficient to deny the motions. Here were two decisions on motions which disposed of two valid claims requiring a trial. There is no law that countenances such decisions. The Constitution is dead set against both decisions. They were contrary to the facts as presented which supported them and were deemed the true facts. The law he cited was inapplicable. The other six decisions dispose of motions made without discussing the facts but the orders simply state "denied". Now I was the author of the papers submitted on the appeals and on

the motions. I knew that the facts I submitted were the true facts and that the law was the law appropriate to those true facts. To me it was simple to know that that Judge Meskill's fact statements were untrue. In fact, when I argued the civil rights suit which was a very short argument, having been given only ten minutes and the facts were many and required at least 25 minutes, I said that being the author of the statement of the facts to the court, I knew they were the true facts. I heard a noise coming from the bench from Judge Meskill, which was the usual sound made when one expresses a disbelief in what he has heard. I knew then that he would issue a decision against me. Apparently, he was making decisions contrary to the facts I had submitted. I hate to say it, but the implication was that he was denying everything I was asking for without trying to rationalize my facts. When the decision was published, I could see that he was acting arbitrarily in finding the opposite facts to my request for relief.

Before now, I would have generally appealed the decision, but when a decision like

which is a violation of the Constitution and denies me my guaranteed rights, I sought other means to bring that unconstitutionality out in the open. Especially so, since such decisions being violative of the Constiution are null and void, and they do not in fact dispose of the case. So I set about getting a correction by proving the unconstitutionalty of the decision.

My first motion in my civil rights suit was a denial of the motion to reargue. I had filed a petition for rehearing suggesting an en banc hearing becuase I believed that constitutional questions were important. Instead, the petition for rehearing was returned untouched and very probably unread because it was said to be out of time. I did not believe it was out of time because I had been in touch with the Clerk's office to find out when the time to file the petition would expire. I was told always "within 30 days of the date of entry of the judgment". No judgment appeared as of record up to the date I filed the petition so I thought the filing was timely. The return of the petition was "lateness", counting from the date of the decision. I explained my concern with trying to find when the last date

to file the petition was unknown and I was not aware that the Court would consider the date of the decision as being the date of the judgment. The Rule states that the petition may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order. Accordingly, when the petition was returned with the notation that the time to count started upon the date of the decision, I couldn't understand that because the statute says "judgment" and a judgment is a separate paper and I had expected that separate paper to be noted on the record, and even to receive a copy from the Clerk. I received no notice that the judgment was entered. The Rule is that a Judgment which is a separate piece of paper from a decision is entered by the Clerk. See Maryland Cas. Company v. Jacobsen, 37 FRD 427, where the case talks about the separate acts of entering a judgment saying that it is a separate paper. See Braughm v. Cooper Jarrett Inc., 430 F.2 521. At any rate, the facts were compatible LE with a valid effort to file the petition on time and as a rule to enlarge the time to file the petition

would be granted if the "interest of justice" were to be followed. I moved to enlarge my time accordingly. That motion was denied. No explanations were made and important matters of interest were being denied without the consideration they deserved.

The first thing I thought of after this result was that I should file an affidavit of bias and prejudice against Judge Meskill, but I found that Section 144 of 28 USC applied to District Judges and not to Circuit Court Judges. I searched for and found Section 372 of 28 USC and Local Rule 0.24 of this Court. After giving it more thought because these latter rules appear to be quite rigorous, I was impelled to go forward because constituional rights were involved and as they represent the most important set of laws in our way of life, I felt that the protections afforded by the Constitution are really for the protection of one like me. Also, the correction of such transgressions of the Constitution are matters that should be made for the sake of the Constitution itself. The

proof of Judge Meskill's action is in the writing of his decision and by putting them in relief to the true facts and the appropriate law applicable as appears in the record of the facts, those writing sare decisions in violation of the Constitution. He was repeating the actions he had taken in the admiralty appeal in the Zack Metal case.

Obviously, the Surrogate had not slacked his thirst for revenge against me by avoiding his unconstitutional decision making. In the Sherburne Estate, he wanted very badly to fix my fees at a figure which would show off his power to hurt. But at this point, I appealed his decisions becuase he had transgressed due process by going outside of his jurisdiction. A judge acting outside of his jurisdiction is acting unconstitutionally. See Kolb v. Feuerstein, 308 U.S. 433. He had denied the executors' right to invoke discovery proceedings by refusing to issue theprocess to commence the proceedings. This was an unconstitutional act. See Boddie v. Connecticut, 401 U.S. 371,

which said that a State Court may not shut the doors of its court to a litigant requiring its use. He had also granted permission to the executors to resign, but he then refused to accept the resignation and the final account as is required under Section 715 and 716 S.C.P.A. Apparently, he thought better of the permission to resign he had given because he saw in it that the executors and I could sue at common law for our fees and not be subjected to his power of decision. So he denied his jurisdiction to grant relief according to the statutes in force. This, too, is unconstitutional. See Escoe v. Zerbst, 295 U.S. 490; Carter v. Stanton, 405 U.S. 669; Adikes v. S.H. Kress Corp., 398 U.S. 144; United States v. Henning, 304 U.S. 66; Southern S.S. Co. v. N.L.R.B., 325 U.S. 31; Evans v. Abney, 396 U.S. 435; and Hobbs v. McLaine, 117 U.S. 567. Also in Schware v. the Law Examiners of the State of New Mexico, 353 U.S. 232, the Supreme Court said that the Courts of the State of New Mexico had not discussed the facts presented by Schware to qualify him to take

the bar exam. Consequently, his facts were not considered and that was a denial of due process. Mr. Justice Black wrote for a unanimous court reversing for that reason. Also, see the cases of Bouie v. Colombia, 378 U.S. 347; ~~American Rwy Exp~~ Corrigan v. Buckley, 271 U.S. 323 and Morrissey v. Brewer, 408 U.S. 471. There are more cases stating that courts may not ignore the true facts and the appropriate law because doing so would violate the Constitution. Also, in Goldberg v. Kelly, 397 U.S. 254, the Court said that an impartial tribunal was necessary to meet the demands of due process and that was repeated in McDonnell v. Wolfe at 418 U.S. 539 in which the Supreme Court stated that an impartial Court was the touchstone of due process to give a party freedom of arbitrary action by a government agency. Judge Laurino was guilty of these types of transgressions. Then in January 1983, the Court of Appeals of New York decided In The Matter of Piccione, 57 N.Y.(2) 278 which overruled the decision of the Appellate Division at 85 App. Div.(2) 604 which was the case relied

upon by Judge Laurino to deny that he had jurisdiction to grant discovery proceedings in the Sherburne Estate so that the arguments of the Court of Appeals had been anticipated by me in arguing for an order in discovery. Believe it or not, subsequent applications to the Appellate Division to vacate their prior order affirming Judge Laurino were denied. Those orders stated a different rule of law than the one laid down by the Court of Appeals.

Additionally, the Surrogate's Court is by law a Court of limited jurisdiction. See In The Matter of MacDonald, 121 N.Y. 272; and see 1A Warren & Heaton, Surrogate Practice, Section 364 at p. 5-485. Judges of courts of limited jurisdiction are not entitled to absolute immunity from civil rights suits. See Bradley v. Fisher, 20 L.ed. 646; 46 Am. Jr.(2) Courts, Sections 72, 75 and 76. When a court of limited jurisdiction acts outside of the jurisdiction granted to them, they act without jurisdiction and are not entitled to the grant of immunity and such judges are liable to suit for violating the Constitution.

See United States v. Nixon, 418 U.S. 683; Davis v. Passman, 442 U.S. 228; Scheuer v. Rhodes, 416 U.S. 232; Woods v. Strickland, 420 U.S. 308; Dennis v. Sparks, 449 U.S. 24 and Stump v. Sparkman, 435 U.S. 345. In the latter two cases, the Supreme Court had granted immunity but expressly stated that those courts were courts of general jurisdiction which, unless courts of limited jurisdiction, do not act without authority. Accordingly, when I started the civil rights suit naming Judge Laurino and his clerks and the parties involved in the estate who caused the denial of the orders, I felt certain that I could state a cause of action for the violation of my civil rights suit. But a motion to dismiss was made under Rule 12(b) alleging that individual litigants were not subject to suit nor were the official acts of the Surrogate or of his clerks subject to suit. As we have seen, this was not so, and plaintiff argued as herinabove mentioned citing the same decisions in support. Statutory rules of S.C.P.A. such as Section 2103, 715 and 716 were cited and

plaintiff cited U.S. v. Lee, 106 U.S. 220-226 for the statement made by the Supreme Court in that case that no man in the United States is above the Constitution. Judge Sifton disregarded all the law respecting lack of jurisdiction and dismissed the complaint on the ground that plaintiff had not alleged "standing" to sue as required by Article 3 of the Constitution. When a party who has been deprived of his constitutional rights uses the civil rights statutes to invoke the protection of that statute, he is acting in accordance with congressional consent and needs no other authority to vindicate his constitutional rights. I moved to rearge to explain this obvious principle of law but Judge Sifton found another excuse to dismiss the complaint, this time by saying that Local Rule No. 3 requires a motion to reargue to state the particular points overlooked or misapprehended. I had explained fully the misapprehension regarding the civil rights statute and the grant of authority to litigants to vindicate their rights by direct suit. But Judge Sifton denied the

motion saying the application was not in accordance with the Rule. This was a clear case of favoring form over substance as was outlawed with respect to pleadings by the Supreme Court in Conley v. Gibson, 355 U.S. 41. Judge Sifton's lack of standing was explained by him to rest upon the fact that the persons really hurt by Judge Laurino's decisions were the clients. But that was not so because an attorney has protected rights to earn a living in his profession, by representing clients and espousing their causes. See Koenigsberg v. State Bar, 353 U.S. 253, 257, 258. Also, Keker v. Procunier, 398 F. Supp. 756 and 759 states that an attorney is deprived of his consittutional rights when a court denies his clients' rights that he is protecting when they are denied in an unconstitutional manner. Also, see Wounded Knee Legal Defense/Offense Committee v. F.B.I., 507 F.(2) 1281. During the course of getting these decisions in the District Court, Judge Laurino, in the Sherburne Estate, continued his unconstitutional attacks upon the plaintiff's actions in his Court. He had refused

to have plaintiff argue before him an application for an adjournment of a motion by the legatees to hold the executors for contempt. I had resigned as the executors' attorney in June 1983 and had hired my successors for the executors and was waiting for a substitution of attorneys. I had agreed with that successor that I would appear on the return date of a motion to hold the executors for contempt to apply for an adjournment for him. I appeared but the Surrogate would not let me make the application. In fact, on a secret signal to his police officer, he had ordered the police officer to eject me from the courtroom. I was physically and violently handled by the police officer and ejected. I had been talking at the time in making the application, but he had cut that off. Also, I had made up my bill for services which was approximately $79,000 and sent it to the executors for payment.

With Judge Sifton acting arbitrarily as he did, I had filed a notice of appeal but at the turn of these events by Judge Laurino, I thought that I had better amend my complaint to include

two new causes of action. I did. The Rule is that a complaint may be amended by permission of the Court even after an appeal has been taken. All that is required to be done is for the District Court to ask for a remand, so that he may consider the amendment. See Section 1489 of Wright & Miller headed "Amendment After Judgement and Appeal" and the cases cited at p. 445. Also, Rule 15(a) F.R.C.P. gives a general grant of authority to amend to the District Court. The motion made was for permission to amend and one of the causes of action was to enjoin Surrogate Laurino from deciding the matters in his Court that dealt with plaintiff's interests. New York Law is to the effect that a Judge who is a party to an action involving a litigant in his court may not sit as a judge when that party's interest is to be determined. That is Section 14 of the Judiciary Law. Judge Laurino had been made a party to the civil rights suit, so I requested an injunction pursuant to Section 1985 of the Civil Rights Act. The motion to amend came on to be heard before Judge Sifton

and he denied that motion because he claimed he lacked jurisdiction on the filing of the notice of appeal. He refused to ask for a remand, and he did not discuss the question of the injunction and the necessity for an interim stay of Judge Laurino from deciding the matters involving my interests that were then pending in his court. I filed an amended notice of appeal and both appeals came on to be heard before a panel headed by Judge Meskill. How or why Judge Meskill was found on that panel, I don't know, but I suspect that Judge Meskill requested that assignment. He had in the meantime decided two motions made by me for a stay of Judge Laurino's action in respect to any matters in his courts which involved my interest. He had denied those two motions in a rather peremptory manner. He did not discuss any case submitted as my authority for an injunction. Judge Laurino had threatened to commit more constitutional torts that could be the subject for a stay pending the final determination of the action in Federal Court. Also, as a presiding judge of the panel, a fact

of which I had no knowledge, he denied my letter request to increase my argument time from an allotment of ten minutes to at least thirty minutes because I was arguing, in fact, two appeals and eight causes of action incorporated in two complaints. But that application was denied.

Reverting to the Surrogate's Court, litigation there was being continued by Judge Laurino. In fact, he was considering several motions respecting the pleadings filed on a new final account which had been filed by the executors' new counsel. I had asked Judge Laurino to recuse himself during the course of those motions. He refused to do so saying that such a motion should be made directly to him. I did so but the whole thing was a sham as he denied the motion in a decision explaining in self-laudatory language that did not deny the reasons taken by me why he should recuse himself. He denied the motion to recuse him, yet in doing so, he was disqualified not only by Section 14 of the Judiciary Law which states that when a judge

has a personal interest, he must not sit in judgment. The case of People v. Kohl, A.T., 17 Misc. 2, 320, and Oakley v. Aspinwall, 3 N.Y. 457 and People v. Witridge, 144 App. Div. 493, state that where a judge has an interest, he is disqualified. The same is also said in N.Y. Jur., Judges, Section 44 at p. 396, and In the Matter of Capuano, 6 Misc. (2) at p. 487, Judge Laurino had already directed a vacature of the notice of trial by jury that I had filed, and when he refused to recuse himself, we find him in a position to try the fee question which was the situation that he wanted to accomplish all the time.

It is well to recall what Chief Justice Marshall said in Cohens v. Virginia, 19 U.S. 264 at p. 403, 405 where he said:

> "It is most true that this Court will not take jurisdiction if it should not, but is equally true that it must take jurisdiction if it should. The judiciary cannot, as legislators may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it up because it is doubtful. With whatever doubts and whatever difficulties a case may be attended, we must decide it if it be

> brought before us. We have no more right to decline jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

In the same case the Court said at p. 414 "The Constitution and laws of the state so far as they are repugnant to the Constitution and laws of the United States are absolutely void." The many cases heretofore cited showing a trangression of the Constitution by Surrogate Laurino fall within the proscriptions of Cohens v. Virginia.

Judge Laurino had no more right to sit on the motions before him inolving my interest or on the subsequent trial of my fee question than if I had flashed a gun in his courtroom and demanded anyone displacing him as a judge. This appears from the complaint as stated and as a fact pleaded, it could not be denied on a motion under Rule 12(b).

Judge Meskill's decision on the appeal did not advert to the true facts of the case nor to the law claimed in the complaints, but he stated other facts which weren't true. He broke the first rule of his duty to consider a

motion under Rule 12(b), the rule that facts well-pleaded are deemed admitted. His decision is attached hereto. It is short and touches only the issues he could decide to dispose of the case on the facts he stated. Only they were not the true facts. They were manufactured for this decision. He slants the whole opinion by wrong expressions here and there to support the decision when as a matter of fact, if the truth were known, the decision could not be supported. For example, he said that appellant argued pro se. What I said in my argument was a small pice of the facts. He stopped the argument though he knew very well that I had not even covered an explaination of the first complaint, and there was a second complaint to be discussed. He had established ten minutes time to argue, woefully insufficient time to cover two complaints and eight causes of action. In preparing to argue my appeal I went as fast as I could in stating the first complaint and found that it would take me 20 minutes to state the six causes of action alleged. When I

received the limitation to 10 minutes argument, I wrote a letter to the Court asking for more time for the reasons just stated. I was told by a clerk that that time was refused. On the argument itself I noted that he had permitted my opponents ten minutes each as well. But each took about a minute to press a point that was not lawful before the Court as his argument. I also noted that the judge had permitted a previous appellant to run over his allotted time. But when I asked for more time, he made a big to-do and gave me one minute. Nonplussed, I was trying to determine whether to proceed where I had left off, or to get into something new when that minute expired and he would not hear another word. He actually laughed at me when he put an end to the argument. This is America, New York, in a Circuit Court of Appeals, not a hastily convened court in a backward nation. But he claims in his decision that I argued, meaning I made a full argument. Why?

Then he awards double costs. He later says that that was because the appeal was

frivolous. That is not so as the citations herein mentioned prove. It was made frivolous by his handling of the matter, and he charged me for costs when properly speaking, he was required to give me a chance to argue not to contrive to avoid my argument, and then he penalized me. His animosity against my case is made plain by these events. A judge should not have let any animosity be shown. He must do what the law says he must do.

He did not decide his decision according to law. That is not due process, but the bigger failure is to accept the facts as stated in the two complaints as true. He resorts to summarizing the facts at p. 2 of the decision, but the conclusion was that my claim of deprivation of constitutional rights arose by my "unsuccessful representation of the executors". Of course, they arose out of the decisions made by the Surrogate because his actions had deprived me of my constitutional rights. But he does not say that. He stops where he had given the impression that I lost and that had disgruntled me but does not say anything about how I lost nor about my

efforts to get the relief to which I was my law entitled from the Surrogate under the true facts.

Then he repeats what I say about the Surrogate's decisions that they were "arbitrary and intentional" but he does not recognize that he is talking about what I claimed was the unconstitutional character of Judge Laurino's decision. He acts like I never made that claim. His terminology is frustrative of the purpose of my complaint and it done to make it appear, wrongfully, that that was why I was complaining. I was actually complaining about the District Court's decision becuase it was wrong when the Court said I lacked standing. And I was complaining that I was deprived of my constitutional rights to practice law by representing clients in the courts. See Koenigsberg v. State Bar, supra. He overlooked the nature of my complaint by insisting on pouh-poohing the nature of it. Thus, he misapprehended the constitutional rights which the complaint was stating. A judge of a Circuit Court may not overlook or misapprehend the statement of facts in any complaint which states a right to recover on

a motion to dismiss under Rule 12(b), let alone misuse those facts to support a wrongful dismissal. The judge's duty is to find the true facts and apply the appropriate law to them. In other words, to do justice, not to deny justice by an unlawful misreading of the complaint. That is a denial of due process. The cases say that the denial of due process is null and void. See Cohens v. Virginia, supra, and Marbury v. Madison, 1 Cranch 137, 179. The Marbury case is famous for estalbishing that a decision may not be an arbitrary one or intentionally uttered against the prevailing law for it is a violation of the Constitution. It was cited in my brief to describe the extent of Judge Laurino's unconstitutional actions. Here, we see Judge Meskill refusing to obey a Supreme Court decision in using arbitrarily and intentionally words of the complaint to misapply the real meaning. The Constitution is not dead as some people think. Among them, I find judges who ignore it because they want to decide a matter according to their own brand

of law and they run afoul of performing an unconstitutional act. Ignoring the facts and the appropriate law of a case is a denial of due process. See Carey v. Piphus, 435 U.S. 247 (1978); c/f Gibson v. Berryhill, 1973, 411 U.S. 564, and also Haines v. Kerner, 406 U.S. 519 which should have ruled Judge Meskill to reverse the District Court. Need it be said that a Circuit Judge must obey the Supreme Law of the Land, as the same is explained by the Supreme Court, instead of what he personally says is the law. He is not exempt from following the Supreme Law of the Land, but he is required to apply it as it is stated. There is no rule or presumption that gives him the right to ignore it just because he is sitting and deciding matters as a Circuit Judge of the Court of Appeals. Rather, the statutes say that he must obey the Constitution. See 18 U.S.C. Section 241 and 242. See also O'Shea v. Littleton, 414 U.S. 488 which treats of these sections of the Federal Criminal Code.

Then he makes two positive misapplications of law at the bottom of p. 2 of his decision.

He says that the District Court had no jurisdiction to amend the complaint because of the intervening appeal that plaintiff had taken from the denial of the first complaint. That is not so. A complaint may be amended after an appeal. See Section 1489, Wright & Miller under the heading, "Amendments After Judgment and Appeal". Cases are cited at p. 445. Also, see McHenry v. Ford Motor Co., 269 F.2d 18 and Rule 15(a) which states "Leave shall be freely given when justice so requires." This statute was ignored. Also, see Foman v. Davis, 371 U.S. 178 where the Supreme Court says that if the circumstances show a subject for relief, the plaintiff ought to be afforded an opportunity to testify to his claim on the merits."

The second misstatement of law is the statement that Fed. R. Civ. P. 60 was inapplicable as a proper reason for denying the motion to amend. In the first place, I had never advanced Rule 60 as being applicable. This was a mistake made by Judge Sifton. Whereas I had stated in my motion papers that I was

moving to reverse his decision of dismissal because Rules 59(b) and 60(b) granted permission to the Court to reconsider motions erroneously decided even if the case had reached the appeal stage. I would appear that Judge Meskill's statement is something he wanted to say but not something that he should have said. His duty was to read the party's claims correctly and decide whether or not the law permits the relief requested.

Then at the top of page 3, he claims that the complaint fails to raise a substantial Federal question. Reading the two complaints will show that that statement is factually incorrect. He specifies and says that the actions of the individual defendants do not constitute State action, but again he does not read the facts of the complaint or the facts contained in my affidavits in opposition. I clearly state that those individual defendants had moved Judge Laurino to act unconstitutionally. The law applicable is very simple and it states that where individuals aid and abet a violation of

the Constitution, they are themselves liable for that violation. See United States v. Price, 383 U.S. 783, 794, and Ketchka v. Davis, 2d Circ., 411 F.(2) 436.

Then Judge Meskill's grant of absolute immunity to the State officials is a clear error because the briefs of the plaintiff clearly stated that neither Surrogate Laurino nor any of his clerks were entitled to immunity because they worked for a court of limited jurisdiction and they are not acting within the jurisdiction which is defined by the Surrogate's Court Procedure Act. The law of New York: In Re MacDonald, supra, which states that the Surrogate's Court is a court of limited jurisdiction, and, in the case of Bradley v. Fisher, 20 L.ed 646 states that a judge of a court of limited jurisdiction is not entitled to immunity unless he acts within the statutory jurisdiction granted him. These state officials acted without jurisdiction. Judge Meskill completely ignored the distinction between a court of general jurisdiction and a court of limited jurisdiction.

Yet, the two recent Supreme Court cases that granted absolute immunity, viz.; Dennis V. Sparks, 449 U.S. 24 and Stump v. Sparkman, 435 U.S. 349, plainly and clearly state tht those two judges were granted immunity because they were judges of courts of general jurisdiction in making the decision that was under attack. Judge Meskill should not have been so naive as to not notice this difference in the judge's position in being entitled to immunity.

Also, the question of immunity was litigated in a District Court but it was denied by the District Court. There is no appeal taken from that denial. The respondent simply reargued it on the appeal without leave of a cross-motion. I had explained this matter in my brief but Judge Meskill overlooked it.

But on this point, too, Judge Sifton's dismissal was without discussing this claim at all. Inasmuch as I had shown the law in opposition to that point, and he had not discussed the point to support the dismissal in any way, he had not used it to help prove the dismissal.

The inference is that he had denied that point. Again, as in the matter of immunity, defendants did not file a cross-appeal to reserve their argument in this Court. Why did Judge Meskill, without jurisdiction, review and decide the dismissal was proper because of this point. It is obvious that Judge Meskill used his own brand of law to affirm the decision below on a consideration of points which were not considered as important to deny the motion by the District Court. Judge Meskill's action is a case where he had to invoke what he considered the interest of justice for an all writs order. This is the usual run of action and the presumption would favor the plaintiff's argument that Judge Sifton had found those grounds as not impelling him to grant the motion. It is respectfully submitted that Judge Meskill acted without any support in law to refuse to reverse the District Court.

The affirmance and the two decisions denying my motions for a stay pending the appeal were all three decided against the true facts and the appropriate law. Why? I don't really

know. But I do know that the facts and the law were stated with proof of the facts made evident. But the inference is either that an unstated presumption of some sort was applied or that it was done for a purpose. Both of these assumptions are unlawful if that is what was done. That is because constitutional questions were in the balance and could not be treated by presumption or arbitrarily. See, Bose Corporation v. Consumers Union of U.S. Inc., 80 L.Ed. (2) 502, 522, 527, where the Supreme Court said that constitutional questions be considered de novo by the appeal court. Had that been done, the kind of decision made by Judge Meskill would not have been written.

Presumptions are common in the Circuit Court, but they explain away the decision on an excuse and not on the merits. A presumption was possibly just nor relied upon. The matter is reduced to arbitrariness. While I have no proof except that I have proven the law appropriate to the facts of my case and

that proof would lead to a decision in my favor. Instead, the arbitrariness is a reasonable inference to explain the decision. Arbitrariness as a cause for the decision violates due process for the real facts and applicable law are not decided but ignored. See Mr. Justice Douglas' comments in Pierson v. Ray, 386 U.S. 547 at pages 565, 566, in which he states that a decision resting on a judge's predilection transgresses due process. Also, the attached article written by Mr. Chief Justice Warren E. Burger about the duty to shun arbitrariness in a decision involving constitutional questions should be read. Mr. Chief Justice Marhsall's problem in Marbury v. Madison, 1 Cranch 137 is used by Mr. Chief Justice Burger to indicate the need for the Court to examine the constitutional question and decide the matter directly on the merits. Marbury v. Madison is an instance of deciding the case in a constitutional manner rather than taking the easy way out when the question has to be decided in an atmosphere where public policy was in favor of

an arbitrary decision. Mr. Chief Justice Marshall refused to follow the easy way out, and he said in that case at p. 179 that a contrary decision would be null and void. It must be remembered that Mr. Justice Marshall was a contemporary of the framers of the Constitution. He was a contemprary of Hamilton, the Federalist. Nevertheless, he continued to uphold the Constitution proving that the Constitution is only as strong as the man who is to interpret it and that the Constitutional guarantees are applied when they are in the hands of men who are dedicated to upholding the Constitution.

Also, I recently wrote a letter to the New York Law Journal regarding the harm of the press of business upon our courts, causing losses to our citizens in need of the protections of our constitutional rights. It was published on October 18, 1984. It suggested a solution to insure that no one shall be denied vindication of the loss of a constitutional right. I attach hereto a copy of the Law Journal's publication.

Also, Sections 241 and 242 of 18 U.S.C.A. outlaws the violations of the loss of constitutional rights. See O'Shea v. Littleton, 414 U.S. 488, in which the Supreme Court asserts these statutes as a means of correcting a constitutional violation by the Court. Judges are not immune from prosecution under these statutes and it follows that the statutes apply to judges.

JUDGE MESKILL'S ACTIONS IN M.W. ZACK METAL COMPANY v. INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, ET AL.

Here again, we have Judge Meskill asserting a positive stance. "Read the majority opinion of affirmance," which is a decision against the justice of the case and ignores the true facts and the applicable law again. It is not that I would complain about decisions because I am displeased with losing the, but every complaint I make on appeal is never denied on the grounds it is not true and the court reverts to the facts and explains where the truth is to be found. I am displeased by

decisons because they cause a loss of large sums of money by unlawful decisions that, if the truth were known, would impel the decision to grant my relief. When I do so, I assert the legal rights in truthful manner proving my loss. I personally have high regard for the judiciary. Its responsibility is a very awesome one; it effects national well-being; it had a considerable burden for it to bear, being in a sensitive sphere of human activities and being overburned with cases that only adds to the stress of public service. But they are humans and not deities, and they err. In that case, the injured are entitled to be reheard. This letter is already too long, but it was necessary to explain the situation. I am wondering whether it wouldn't be best to say to the Court that Judge Meskill's arbitrariness in deciding the Zack Metal case was because he did not accept the facts of theplaintiff but ignored them, and he applied the wrong law as well, just as he in the Civil Rights case.

The case was an ordinary cargo damage claim of which I handled many in my practice. The facts are simple. My client, as owner of a shipment of steel delivered it to the ship at Antwerp for transportation to New York in good order and condition, as is stated in the bill of lading issued when the ship accepted the goods for carriage to New York. The steel travelled in coils, tightly bound by steel straps. This is their usual way. They are bound together to the sides of the ship by straps. On the way over they broke their stow and had knocked about in the holds in coils knocking against each other to break their straps and to loosen the coils and to bend and cut the sheet so that most of the coils lost their use for which they were intended, which was for automobile bodies. The loss of their intended use was a compensable loss which could be determined by experienced surveyors. As a matter of fact, the rule of damage is that it may be measured by offering the coils for sale in their damaged condition, and apply the proceeds of such a sale to its

market value as sound coils, the the difference would be the amount of the loss suffered. To that amount would be added the cost of handling the coils in damaged condition. The damage in this case was fixed by selling the steel in the open market and the loss proved an amount of $80,000. The ship was chartered to the actual issuer of the bill of lading, and both the charterer and the shipowner were liable for the loss. Both were insured by separate British marine insurers, but the insurers so handled the defense of the suits that Zack was unable to collect its damage though a judgment was obtained. It was appealed, and on the appeal, affirmed, and Newcastle, one of the insurance companies, put up an undertaking on appeal to guarantee payment of the judgment if affirmed. The affirmance occurred, but still they refused to pay. The truth of the matter was not within the ability of the attorneys for the insurance carriers defending the suits to understand. Instead, they resorted to perjury to prove that they were not liable.

They even attached the proceeds of the judgment against the ocean carriers on false claims that Zack owed them money, an impossible situation. But by attaching the proceeds, they prevented collection and that is where the matter stands today.

On the appeal they conspired to deceive the Court by claiming this suit is time-barred.

To repeat, to get into the ramifications of what the attorneys for the insurers did to avoid payment of the just claims of the plaintiff would make this letter overly long. It is perhaps better to present the majority opinion of Judge Meskill and the minority opinion of Judge Cardamone, and to note the hard-nosed but unlawful attitude of Judge Meskill, as differing from the minority opinion. In comparing the two, one is struck by the sincerity of Judge Cardamone that the damage done to plaintiff gives us inescapably compensable rights, while the majority opinion was abullying use of power in refusing to do justice. The proof used by the minority shows

the damages caused by the frauds that were perpetrated by the insuring defendants' attorneys to beat the liability under their contracts.

Why didn't Judge Meskill note the miscarriage of law by refusing to hold them liable, and again plaintiff was left with words of condolences, for they cannot collect the money which was readily admitted to be due them. The excuse dreamt up by the majority, upon investigation, proved to be straw and straw is what plaintiff got from Judge Meskill's effort at doing justice.

The complaint in the Federal Court in New York alleged five causes of action, the first dealing with theordinary liability of an ocean carrier for the failure to safely carry the goods in thesame good order and condition as when received. The second two causes of action were directed to the insurance carriers of both ocean carriers for their failure to pay under their policies to the plaintiff, as a third-party beneficiary. The fourth cause of action was

against the marine insurance company who had filed its undertaking on appeal but failed to pay the judgment when it was affirmed. The fifth cause of action was one for fraud upon the courts by deceiving them by misstatements of fact, important and vital to the acitons stated in the complaint as, for instance, the frauds that were committed in the original action which wa started and tried in the courts of Hamburg, Germany, by which they caused execution on that judgment to be limited to a levy upon Severn River, though she had sunk three years before the decision when the law required such a levy be granted if the ship was a live ship being used and navigated.

Then, they misstated facts in the suit in Norfolk court and in the suit in New Jersey. Those fraudulent facts were stated as the base for recovery in the fifth cause of action.

However, defendants' gross disregard for law and order was continued in the Federal court action by an attorney, one Donald B. Allen, who wrote his clients that "attack"

was the best way to defend the action. So he used false statements to avoid liability for their clients and openly practiced that theme in the Southern District of New York.

Judge Sweet apparently for a long period of time during pre-trial litigation would advert to that propensity of stating fraudulent facts by defense counsel to help plaintiff in discovery proceedings to prepare for trial. Mr. Allen had so misstated reasons why discovery should not be permitted that Judge Sweet had actually gotten to the point of directing the production of witnesses by a given time in default of which the plaintiff was entitled to enter default judgment. At this point, Mr. Allen went to England and personally consulted with the insurance carriers for the defendants and told them both of his problems about being required to produce or be defaulted, and evidently he arranged for a substitution of the firm of Dickerson, Reilly and Mullen of 30 Broad Street, for his firm of Hill, Rivkins, Carey, Loesberg, O'Brien and Mulroy.

The Dickerson firm agreed to enter the litigation as attorneys for the shipowner and charterer, while Mr. Allen continued the representation of the two insurance companies that had insured the shipowner and charterer. Mr. Robert N. Mullen of that firm took charge. He moved to dismiss the complaint as to his clients for an alleged failure to serve process on them properly. They were served in person by a professional process server at the offices of theshipowner's agent in Baltimore, Maryland, and at the offices of the charterer at their Hamburg office. Their motion was granted. Mr. Allen continued to claim reasons why the deposition of the insurance companies should not be taken, but again those reasons were untruthful statements of the facts, but this time Judge Sweet eventually entered an order which stopped the examination of defendants' books. According to the calculation of Mr. Allen, stated during the motions to truncate the examination, he stated that only 20% of the books and records

that he had available for examination were examined. The examination had been going on according to Mr. Allen's demands. He would permit only one day a week and that to start 2:00 P.M. He then professed to be unable to continue them on a few of those days and no examination was held at all. But one would think that where he had stipulated such procedures that he would be bound by them to the finish of the examination. But the consideration for stopping the examination was now subsequent to the visit of Mr. Allen to his clients in Europe and the arrangement for retaining Dickerson, Reilly & MUllen. And upon the joining of Mr. Mullen with Mr. Allen to end the examination, Judge Sweet did so. Not only that, but on the motion to dismiss the complaint under Rule 12(b), he granted the motion as to all causes of action except for the fourth which was the cause of action on the written guarantee of the payment of the judgment recovered in Hamburg, Germany. In excepting that cause of action from dismissal, he ordered that that

cause be tried immediately and without a jury despite plaintiff's demand for a jury. He directed that the trial be had before himself by a specific order to that effect.

The peculiarity of the pretrial proceedings on this fourth cause of action was the fact that Judge Sweet was annoyed and said so, by my defense against the many false statements that were being used by Mr. Allen to end the examination. As a matter of fact, Judge Sweet took time out during an appearance on a motion of Mr. Mullen to state loud and clear that one more complaint out of me about Allen or his firm or the Dickerson firm, that they were out to defeat this suit by resorting to false statements of fact, would be cause to hold me in contempt of court. That was a topsy-turvey statement and I never trusted that man again.

Also, there was some sort of a feeling by Judge Sweet that charging an opponent of falsifying before the court was a crime and that he would not stand for it. As a matter of fact, Judge Sweet was finding that I was

not entitled to the relif which I was seeking, if included in my papers was a reference to Mr. Allen asking for relief to which he was not entitled by theuse of false statements. He exhibited that frame of mind very clearly on the trial of the fourth cause of action. As a matter of fact, when I offered the proof that a decision of January 9, 1975 had stated untrue facts by offering the true facts which were obtained by writings in the shortened examination before trial of the defendants' records, he disregarded that proof and disregarded my request that the trial resulting in that decision made the decision unlawful and null and void. Here we are trying a case which he set down on short notice for trial, and I was trying to show theplan of the defendants to deceive the courts in Germany to grant a dismissal of the complaint there as against the shipowner and they did. He sought to ignore that a judgment to be rendered in New York was being sought by fraudulent actions. He ordered me to discontinue the proof of

fraud though I had that proof in writing. I was trying to support the plaintiff's entitlement to recover on the written guarantee on appeal which was executed by the defendant, Newcastle Protection and Indemnity Association. He even accepted an interpreation of the guarentee offered by Mr. Allen which was contrary to the plain terms of the guarantee supplied by the M. The guarantee was to the effect that Newcastle would pay any judgment of a German Court. The practice in Germany is that a decision of the court is the final word in the case and they have no system such as we have that a separate paper called a judgment is entered by a clerk, but that the decision itself is the judgment of the court upon which execution issues. This law was proven by Zack without contradiction by defendants but it was ignored by Judge Sweet. He accepted Allen's unproven statement that a judgment is a separate paper from the decision. But plaintiff did not offer any proof of a separate judgment. So

he dismissed the complaint because no separate judgment was proven. He was looking to dismiss the case by dismissing the whole complaint and he did that. However, the dismissal was "without prejudice", but he didn't say without prejudice to what. He did explain it by saying that Newcastle owed Zack money but he would not fix the amount which was a simple matter of determining the separate items of damages. This was reversible error. See Lent v. N.Y. and Maine R.R. Co., 130 N.Y. 501 which held that a showing of a failure to pay a sum of money stated, does not require a dismissal but the amount due should be found by evidence of the fair and reasonable amount of damage suffered by the non-payment. Plaintiff proved the amount of damage by competent evidence but it was ignored by Judge Sweet. So an appeal was taken to this court. The matter came on to be heard before a panel headed by Judge Meskill and he affirmed the error. Attached hereto is a copy of his decision in this court. It is to be noted that there was

a dissenting opinion by Judge Cardamone. He would not approve of that dismissal nor of the fraud count. As a matter of fact, Judge Sweet dismissed that count by determining from plaintiff's claims of the fraud committed that though they appeared to prove an orchestrated (sic) fraud, he said it was not fraud that could be sued upon in the Federal Court. Where he got that law, I don't know, but that is not so. Fraud is actionable in a Federal Court if you have jurisdiction over the parties.

Repsecting the proof of the fourth cause of action, it was a show of strength between the judge and me on how to prove the case with Allen prodding here and there. But though plaintiff proved the guarantee and the decision of the German Appeal Court of Appeals affirming the judgment and the ~~dmeand~~ demand for payment and the refusal to pay what was due according to Lent v. N.Y. and Maine, supra, plaintiff established a prima facia case, and the damages were testified to but defendant offered no evidence in contradiction. Judge Sweet

dismissed the case "without prejudice". Judge Meskill affirmed the plain error of an abnegation of jurisdiction. The rule is to decide the case, not find a reason to avoid disposing of the case. Cases were cited but ignored by Judge Meskill.

On arguing the appeal, plaintiff fared no better. He was told by Judge Meskill that he could not write the court letter he had suggested to cover a new phase of the frauds committed; Judge Meskill volunteered to say that he had enough to read a writ of certiorari I had filed along with the appeal to explain the fraudulent facts in the case on appeal which could not be included in the Appellant's Brief for lack of space. He made that comment with an air of annoyance which was visible and I knew he was annoyed with the case. Yet there was no reason given to make him annoyed. Litigants and their lawyers are people too. They should not be treated as props in a lawsuit, expendable at the whim of the judge appointed to do justice.

Reading his majority opinion and knowing the facts of this case like I do because I have been immersed in this case ever since 1960 when the ship landed and the damage to the steel was reported after which I was contantly advising my clients as to what to do in protecting their interest, I find that Judge Meskill never understood the facts of this case. His decision if I may be permitted to say reads like a defendant's efforts at avoiding liability for the damage. Judge Meskill does not state the plaintiff's claims to the damage it suffered but it emphasizes anything that he believed would support a decision for the defendants. For example, the very first paragraph, instead of an impartial statement of the facts, there is one line with which he describes plaintiff's complaint containing six claims for recovery in one sentence to the effect that it "sought recovery for cargo damage and for fraud". Yet in describing defendant's cross-claim he spends almost four lines to misdescribe it. That is page one. On page two the very first line under

the heading "background", he complains about the suit being twenty-two years old and presumes to say that plaintiff consumed an inordinate amount of resources of the court in this country and abroad. Why? This conclusion is a wrongful statement of act. If he had read my papers he would have learned of the many fraudulent facts committed by the defendants to avoid liability. That was the reason for the suit. The inference is clear that Judge Meskill did not want to find that plaintiff was entitled to recover because it had been damaged unlawfully. He later repeats that plaintiff suffered damages unlawfully but he avoids the proper decision in reliance upon unlawful statements of the law. Implicit in this statement is the fact that Judge Meskill acted arbitrarily to deny plaintiff's recovery. He violated constitutional due process.

Also on page two he starts the statement of facts but on page three he misstates what the $80,000 of damages consisted by saying on line eight of the opinion, "was less resale expenses".

The $80,000 includes them as a matter of fact.

Then in the next sentence he does not say that the action could not be commenced because process could not be served because defendants were absent from the jurisdiction of the court. The next line starting with the wo "Thereafter" is a misstatement of fact because the letter was not sent after thedismissal of the cause of action. He even misnames the name of the agent as "Oceana". It is Oceanica. Note the end of the paragraph that he states that the agent granted Zack's request yet later he accepts a decison by the German Appeal Court which held that that request did not lawfully extend the time. Plaintiff argued that that finding of the German Court had been induced by the defendant's fraudulent claims that the agent had acted without authority. Yet plaintiff submitted on this appeal defendants' letters passing between themselves planning to make that argument to the German Appeal Court despite the fact that proof of the agent's authority was in their possession and that they

themselves had agreed that the agent had the authority to sign the extension. Why then did Judge Meskill ignore this proof. It is again a refusal to accept facts submitted by plaintiff. Again, that is a refusal to accord due process and violate the constitution.

Further, the decision on page three makes the misleading statement that the district court actions mentioned were dismissed for fa-lure to prosecute without saying that those defendants had not returned to the jurisdiction of the courts. At the bottom of page three and at the top of page four he fails to mention that the subrogation rights of the plaintiff were not passed on to Federal by the settlement agreement or that when Federal sold their non-existing rights to the Charters and Shipowner that was done to arm the purchasers with a writing giving the false impression that they were the owners of plaintiff's claims against the sellers in the suit in Germany. The ideas was to commit fraud upon the German Court yet, Judge Meskill did not mention it.

Then on page four Judge Meskill talks about the decision of the German Court of December 7, 1971 which limited the shipowner's liability to an execution upon its vessel which was fraudulently obtained because the vessel had sunk three years earlier. Plaintiff's brief explained that fraud very clearly, but Judge Meskill fails to acknowledge it. This is another constitutional error.

On page four Judge Meskill, while he talks about the action started in Norfolk, Virginia, by attaching a sister ship on a complaint, seeking to recover the cargo damage, he again unlawfully and without giving effect to the plain language of the complaint, mis-tates the reson for attachin the "Virtus". That suit was dismissed and appealed. The Fourth Circuit affirmed, and on motion to reargue it limited the dismissal to its holding that the unlawful decision limiting it to an execution upon a sunken vessel was an in rem judgment. It also refused permission to amend the complaint, all of which facts are wrongful but were not

at all stated by Judge Meskill. Yet later on, in the decision, he permits himself to presume that plaintiff was free to assert the fraud claim. That claim was never discussed on its merits and yet Judge Meskill treated the decision as though it was res judicata of the fraud count. Here he was arguing for defendants to defeat this cause of action by volunteering an unlawful reason to support his own decision of affirming the judgment below.

This is a positive affirmative action not suggested by defendants but volunteered by Judge Meskill. Such interference is likewise unconstitutional. In the next paragraph beginning on line fifteen, Judge Meskill states that Zack has not executed upon the judgment of the German Appeals Court, but does not say that the defendants have a stay outstanding which prevents Zack from proceeding on a false claim that Zack owed the judgment debtor money.

Also a little latter, on page five,

Judge Meskill's statement of the denial of the motion to the District Court of New Jersey fails to state that defendants' placed their argument for denial on the false statements by defense counsel that plaintiff had recovered a judgment in Germany without saying that they had unlawfully stayed execution on it.

Then in the last paragraph on page five Judge Meskill only cursorily states the causes of action in this complaint in contrast to his statement of the counter-claim of malicious prosecution which did not state any facts to support it. In fact when it was tried there were no facts proven. It was obvious that the claim was made to distract the court from a proper consideration of plaintiff's claims. But, reading Judge Meskill's decision he added the District Court's expression of being sorry to have to dismisss the counterclaim by adding a volunteered statement by adverting to the alleged incompetence of Zack's counsel advanced by the District Court to a whole statement by Judge Meskill stating his own

presumption that Zack's counsel over the last twenty-two years was a "scatter shot apprcach". He could not find any support for his presumption in the record of this case. It is, however, obvious that he did not want this plaintiff or its counsel to be awarded the decision required by the true facts.

In fact in discussing the plaintiff's claims in this complaint he overlooked the important action of Judge Sweet in deciding that the fraud count did not state facts, that could be decided by his District Court to prove fraud and the decision was apart of a scheme of things to dismiss claims, but is contrary to the true facts and the applicable law. He had no right under a Rule 12b to decide "no fraud" against the facts of the complaint, clearly stating the nature of the frauds claimed.

Instead of reverting to this rule of law, Judge Meskill arbitrarily discusses the false principles of law, which he claimed obtained in Federal Courts. This was insisted upon, using his views to work a miscarriage of justice.

Finally Judge Meskill supports the dismissal of the Fourth Cause of Action on facts not in the record. Plaintiff had plainly proven his "prima facie" case as is explained in Lent v. N.Y. and Main R.R. Co., 130 N.Y. 501. That case says that where a plaintiff proves that a sum of money has not been paid pursuant to the terms of a written document that the complaint may not be dismissed for insufficiency but the damages may be proven on a quantum meruit basis. As a matter of fact damages may be proven by the breach of the contract. The attorney for defendants had claimed that the written guarantee stated that Newcastle would pay according to a final judgment affirmed and argued that the Appellate Court's decision of Germany was not a final judgment. Judge Sweet accepted that argument and dismissed the action without prejudice because "Newcastle owed Zack money", but it would not enter the judgment pursuant to the rule stated in the Lent case. Judge Meskill affirmed and then as is shown by his decision at the top of page ten, he said that there was

no accounting for costs and interest. These last words do not appear in the guarantee. The guarantee is stated in the footnotes at page iii. This plainly proves the arbitrariness of Judge Meskill.

Conclusion

It is respectfully submitted that plaintiff, and his clients, have been denied their rights constitutionally protective of property rights, rights to property, liberty and to the freedom from arbitrariness of government. I could go on and beat my breast and shout accusations galore of the unAmerican practices employed by Judge Meskill. Plaintiff respectfully asks that these practices make the decisions of Judge Meskill null and void. This court ought to correct them by awarding the plaintiff a correction of Judge Meskill's actions by setting aside or vacating the decisions and granting plaintiff the right to move the courts to rectify the loss of their rights.

Respectfully submitted,

Anthony B. Cataldo

PETITION TO REVIEW ORDER
OR DENIAL OF COMPLAINT

JUDICIAL COUNCIL OF THE
SECOND CIRCUIT

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85-8501

In re

CHARGE OF JUDICIAL MISCONDUCT

PETITION FOR REVIEW

----------X

This is the Petition of Anthony B. Cataldo, who has his law offices for the practice of law at 53 Park Place, in the County of New York, State of New York, to the Circuit Council of the Second Circuit, and respectfully shows:

1. That he is the complainant in a proceeding entitled "In re Charge of Judicial Misconduct" under No. 85-8501 of this Court, stating a complaint against the Honorable Thomas J. Meskill, a Circuit Judge of the Second Circuit, charging said Judge with misconduct, in that "he engaged in conduct prejudicial to the effective and expeditious administration of the business of the Court"

as stated in 28 U.S.C. 372(c)(1) [illegible], in respect to two separate suits lawfully before the District Courts having similar problems of fact and of law for thier resolution and because those problems were decided by this Court contrary to the due process and the equal protection of the law provisions of the 14th Amendment to the United States Constitution and were duly appealed, and each appeal was considered by panels presided over by Judge Meskill and was decided by him arbitrarily, willfully and intentionally in violation of said provisions of the United States Constitution, causing complainant harm, injury and damage by depriving him of his constitutional protected rights to property and other immunities and privileges granted by the Constitution, which he sought to correct by resort to 28 U.S.C. Section 372(c) to remedy the wrongs done to complainant as aforesaid.

2. Feeling aggrieved by the decision of this Court in dismissing this complaint,

by decision dated March 12, 1985, Petitioner respectfully appeals from such decision of dismissal pursuant to Local Rule 0.24 of the Rules of this Court.

3. That the decisions of the panels presided over by Judge Meskill in two decisions bearing numbers 84-7275 and 83-7159, respectively, were arbitrary, intentionally and expressly contrived to deprive the complainant of his constitutional protected rights, immunities and privileges, and they clearly denied such protected rights in breach of the provisions of 18 U.S.C. Sections 242 and 241, and they were constitutional torts, subject to civil remedies, and were violative of the oaths of office of Judge Meskill, and, were unlawful, and null and void and of no dispositive effect and were "prejudicial to the effective and expeditious administration of the business of this Court.

4. That the decision of this Honorable Court of March 12, 1985 was erroneous in respect to the true meaning, aims and purposes

of the complainant in preparing and filing his complaint, in that it alleges wrongful conclusion drawn from the facts of the complaint to the effect that complainant regarded the Act as the Circuit version of 28 U.S.C. Section 142; and that he sought the correction of the Judge's action by setting his decision aside and vacating both decisions of the Circuit Court, and that he sought to rectify the loss of complainant's rights in this proceeding, and that such allegations were not matters to be adjudicated in a misconduct complaint, citing "In re Charge of Judicial Conduct, 685 F(2) 1226," but instead, complainant's allegations did not relate to appeals to be heard by this Court under its appellate jurisdiction, as was the case with the decisions of Judge Meskill on the appeals from the District Court judgments, but, instead, this proceeding sought to show that the appeals decided by Judge Meskill were not decided in a constitutional manner and are null

and void and of no dispositive effect, and were prejudicial to the expeditious administration of the business of the courts as is stated in 28 U.S.C. Section 372(c).

5. That the decision of this Honorable Court of March 12, 1985 was not only unconstitutional, as it ignored the true facts and the law applicable in the complaint, but it was arbitrary and it denied due process and the applicable law; that the allegation of this Court that complainant is under the mistaken impression that 28 U.S.C. Section 372(c) may not be used as an avenue of appellate review whereas such allegations do not seek appellate review, but state facts proving the unlawful conduct prejudicial to the effective and expeditious administration of the business of this Court; and said decision does unlawfully misstate the complaint herein, saying that it seeks the recusal of Judge Meskill, when that is not a fact at all; and the decision does not correctly speak of the wrongfulness of Judge Meskill's decision in reviewing the District Court's two

decisions nor does it recognize that Judge Meskill's decision in reviewing the District Court's decision was evidence of the misconduct complained of; also thefurther conclusion of this Court that the remedies sought in this complaint are obtainable by normal adjudication proceedings is incorrect, for the only statute known to determine whether Judge Meskill engaged in conduct prejudicial to the effective and expeditious administration of the business of this Court is 28 U.S.C. Section 372(c) and that section has no wording in it limiting its effectiveness to granting its rights to litigants nor does it deal with matters of retirement or the physical or mental disability of judges; that the facts in this case will prove that Judge Meskill's action caused a further deprivation of the complainant's constitutional rights and that it was a willful deprivation of those constitutional rights, as for example, he decided to grant immunity to these defendants when the question was not

properly befcre the Court because immunity had been denied in the District Court and respondents did not appeal therefrom.

6. This raises an issue of fact respecting the motives of Judge Meskill in importing that issue into that appeal, sua sponta; also the complaint talks of misconduct and not of errors on appeal; that this Court's decision states that the complaint in this action is inappropriate "for the review under the Act" and does not apply to questions that had been, or may be, adjudicated through normal litigation procedure and it is not a correct reading of 28 U.S.C. Section 372(c); also the case cited as 685 F(2) 1226 is not a proper support for this Court's citation of the law appropriate as claimed, but is a case actually in support of the complainant's use of the Act for redressing the wrongs done to him by Judge Meskill, because that case states as an exception to the rule used by the Court, saying that facts similar to the facts of this case and said that they would support the complainant's argument; that

this Court cited another authority, a decision appearing at 593 F(2) 879, yet in that decision none of the conclusions asserted by this Court are stated, but a fair reading of the Act supports the use of the Act in a manner followed by the complainant in this proceeding, for which reasons and others which may be proven at an evidentiary hearing, would require a review of the decision of ~~May~~ MARCH 12, 1985.

7. Complainant believes that all matters submitted to a court in this country must be afforded due process as defined by the Constitution and the Supreme Court. That due process is that, all true facts must be found and the appropriate law applied to it. Assuming that the facts and the law are conceded, then it is the obligation of the court to make the decision called for by law to the facts in this proceeding. He has believed that he has standing to submit his claim against Judge Meskill because he has acted unconstitutionally by avoiding conceded facts and applying the

appropriate law to them in reviewing two decisions of the District Court as stated above. A violation of the Constitution is a violation of the law such as would be encompassed within the words of 28 U.S.C. 372(c), stating that a judge may be guilty of misconduct when, as a judge, if he engages in conduct which is prejudicial to the effective and expeditious administration of the business of the court. It cannot be conceived that an unconstitutional act by a judge does not fall within that language. In other words, in a decision of the court which fails to provide due process or the equal protection of the law in this court also is guilty of the misconduct descirbed in 28 U.S.C. 372(c) as engaging in conduct prejudicial to the effective and expeditious administration of the business of the court. It can rightfully be asked, "what is the business of a court if not to uphold the Constitution?"

Working on this premise, complainant has been claiming before this Court that he is a proper complainant under 28 U.S.C. 372(c)

because Judge Meskill denied him due process and the equal protection of the law in the two cases mentioned and now the decision of this Court in this proceeding has done the same thing. It is respectfully submitted that this Court should, on review of its decision of March 12, 1985, not find any reason for saying that this Court may not consider complainant's claim that a breach of the Constitution is "conduct prejudicial to the effective and expeditious administration of the business of the Court". In U.S. v. Lee, 106 U.S. at page 220, the Supreme Court said "that no man in this country is so high that he is above the law. No officer of the law may set that law at defiance with immunity". In Pierson v. Ray, 386 U.S. 574, the Supreme Court said "that a decision of a court resting on personal predilections of a judge is unconstitutional." That is clear because the predilections of a judge is not equated with the law applicable. Consequently, this Court may not substitute for the

wording in 28 U.S.C. 372(c) as is stated in the decision. The Act, as it reads, does outlaw "conduct prejudicial to the effective expeditious administration of the business of the court". That would be a result of an unconstitutional act and the limitation stated by this Court is not limited to problems arising from the judge's physical or mental ability to perform his duty. The Act is lawfully enacted law of the Legislature. The words have meaning which needs no interpretation and that interpretation is that a judge may not engage in conduct prejudicial to the effective and expeditious administration of the business of the court. That command applies to Judge Meskill's two decisions which have given rise to this proceeding.

WHEREFORE, it is respectfully submitted that the action of Judge Meskill was prejudicial to the effective and expeditious administration of the business of this Court when he violated the Constitution in making his decisions on those two appeals, and this Court violated the

Constitution when it did not find that Judge Meskill had violated the Constitution, and on this review, this Court is respectfully requested that it should invoke and support the Constitution and direct the appropriate measures to correct the wrongs committed by him in those matters.

Dated: New York, New York
March 19, 1985

Respectfully submitted,

ANTHONY B. CATALDO

NOTICE OF APPEAL FROM ORDER OF COURT OF APPEALS DISMISSING OF COMPLAINT IN JUDICIAL MISCONDUCT PROCEEDINGS, DATED JUNE 25, 1985, AND REJECTED BY ORDER OF JULY 1, 1985

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ANTHONY B. CATALDO,
Appellant,

v.

HON. THOMAS J. MESKILL,
Respondent.

NOTICE OF APPEAL

#85-8501

JUDICIAL COUNCIL OF
THE SECOND CIRCUIT

In re:

Charge of Judicial Misconduct.

Sirs:

Please take notice, that the above named appellant does hereby appeal from the orders and judgments of the Court of Appeals, Second Circuit dated and entered March 12, 1985, April 9, 1985, and June 11, 1985, respectively, in the above entitled proceedings to the Supreme Court of the United States.

Dated: New York, N.Y.
June 23, 1985

Yours, etc.,

ANTHONY B. CATALDO
Attorney for Appellant
Pro Se
53 Park Place
New York, New York 10007
(212) 962-0965

To: Hon. THOMAS J. MESKILL,
Respondent
U.S. Court of Appeals
Second Circuit
Foley Square
New York, New York 10007

HILL, RIVKIN, CARY, LOESBERG
O'BRIEN & MULROY, ESQS.
Attorneys for Respondents,
LONDON STEAMSHIP OWNERS
MUTUAL INSURANCE CO., CONTAM
LINIE and LA MORTE, BURNS &
CO., INC.
24 West Street
New York, New York 10004

HON. ROBERT P. ABRAMS, Attorney
General of the State of New York
appearing for Respondent,
LOUIS D. LAURINO
2 World Trade Center
New York, New York 10047

ROBERT SIKORSKI, Esq.
Attorney for Respondents
and ALICE McGINTY, Executors
of Pearl S. Sherburne, Deceased
350 Broadway
New York, N.Y. 10047

GERALD MOSS, Esq.
Attorney for MICHAEL NOBILETTI
ANNE NOBILETTI, JOHN B.
NOBILETTI and FRANK NOBILETTI,
Legatees in the estate of
Pearl S. Sherburne, Deceased
689 Fifth Avenue
New York, N.Y. 10022

DICKERSON REILLY & MULLIN, ESQS.
30 Broad Street
New York, N.Y. 10004

LETTER FROM APPELLANT TO COURT OF APPEALS REQUESTING CLARIFICATION OF FINALITY OF ORDERS APPEALED. SEE DECISIONS OF COURT AT PP. A-8 AND A-10

Law Offices of
ANTHONY B. CATALDO

53 Park Place
New York, N.Y. 10007

962-0965

May 24, 1985

Re: Judicial Misconduct Proceedings
85-8501

Miss Deborah Gottlieb
New York State Court of Appeals
Foley Square
New York, New York 10007

Dear Miss Gottlieb:

I confirm that because I am interested in the above entitled matter I requested of you

the statutory law stating that I am not entitled to a review of your decision of April 9, 1985.

You quoted local rule 0.25 and U.S. Code Section 372, specifically to subdivision B.10 stating that dismissal of "Petitions for review, shall be final and shall not be reviewable on appeal or otherwise." This statute would appear to be in violation of the All Writ Statute granting the Supreme Court power to review all judicial decisions meeting the rule of finality. Isn't the decision of April 9, 1985, a duly entered order finally ending the review granting the petitioner the right to present my complaints to you that the judge involved had violated the Constitution in making his decision stated in the petition?

If so, how can Section 372 prevent the Supreme Court from exercising its power as stated in the All Writ Statute, from making a decision directing the Court of Appeals to conform its decision to the Constitution.

And, how can Section 372 prevent the Supreme Court from exercising the All Writ

Statute to require the Court of Appeals to make its decision conform to the Constitution.

Please let me know.

Respectfully yours,

Anthony B. Cataldo

ABC:AP

DECISION OF MESKILL J.
AFFIRMING ~~CARGO DAMAGE~~ CIVIL RIGHTS
CLAIM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Stamped by U.S.
County of Appeals,
filed 9/28/84, by
Elaine B. Goldsmith,
Clerk, 2nd Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of September, one thousand nine hundred and eighty-four.

Present: HONORABLE HENRY J. FRIENDLY,

HONORABLE THOMAS MESKILL,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges.

ANTHONY B. CATALDO,

Plaintiff-Appellant,

v.

LOUIS D. LAURINO, ROCCO LUONGO, JOHN DeVITO, ANNE JOBILETTI, MICHAEL S. NOBILETTI, JOHN NOBILETTI, FRANK NOBILETTI, ESTATE OF PEARL S. SHERBURNE, also known as PEARL S. WELLS, DECEASED, THE SURROGATE'S COURT OF QUEENS COUNTY, THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS, THE APPELLATE DIVISION OF THE SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK and "JOHN DOE," the name "JOHN DOE" being fictitious and intended to describe the law assistant of the Appellate Division Division, Second Department, who made the report of the Records on Appeal filed in said Court in respect of the Estate of Pearl S. Sherburne also known as Pearl S. Wells, deceased to the panel of Judges in the Appellate Division.,

Defendants-Appellees.

Docket No. 84-7275

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, Sifton, J., dismissing appellant Cataldo's complaint and from a subsequent order denying Cataldo's motion to amend his complaint.

This cause came on to be heard on the transcript of record from said district court and was argued by appellant pro se.

The judgment of the district court is AFFIRMED and appellees are awarded double costs on appeal.

Anthony B. Cataldo brought suit in December 1983 against Surrogate Laurino, the Surrogate Court of Queens County, two clerks of the Surrogate Court, the Supreme Court of New York, the Appellate Division of the Supreme Court, "John Doe," an unknown law assistant of the Appellate Division, the Estate of Pearl S. Sherburne and four legatees of the Estate of Pearl S. Sherburne, alleging constitutional deprivations arising out of Cataldo's unsuccessful representation of the executors of the estate of Pearl S. Sherburne. Concluding

that the only people harmed by the alleged "arbitrary and intentional" decisions were the executors, the district court held that Cataldo had no standing and dismissed the complaint.

When Cataldo sought to amend his complaint subsequent to filing notice of appeal, the district court correctly held that it had no jurisdiction to amend the complaint. It also correctly held that Fed. R. Civ. P. 60 was inapplicable and therefore denied Cataldo's motion to amend.

Assuming arguendo that Cataldo has standing, dismissal of the complaint was still proper because the complaint fails to raise a substantial federal question. The actions of the individual defendants do not constitute state action within the meaning of 42 U.S.C. Section 1983. The state defendants are protected by absolute immunity from liability for damages under 42 U.S.C. Section 1983 as a matter of law.

Cataldo's contentions under 42 U.S.C. Section 1985 are also deficient because no class-based discrimination is claimed. Griffin v. Breckenridge, 403 U.S. 88, 102 (1970).

Because we regard this appeal as frivolous, we award double costs on appeal in favor of the appelles.

Henry J. Friendly, U.S.C.J.

Thomas J. Meskill, U.S.C.J.

Lawrence W. Pierce, U.S.C.J.

DECISION OF SIFTON, DC. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ANTHONY B. CATALDO,

Plaintiff,

-against-

LOUIS D. LAURINO et alia,

Defendants.

----------X

CV-83-3984

MEMORANDUM AND ORDER

SIFTON, District Judge.

Plaintiff, an attorney appearing pro se, commenced this action pursuant to 28 U.S.C. Section 1983 on September 2, 1983, alleging that various defendants, including various judges and court officers who presided over proceedings brought by executors of an estate, participated in a conspiracy to violate plaintiffs' due process rights. The matter is before the Court on (1) a motion by certain defendants for an order dismissing the action pursuant to Rule 12(b), (c) and (h) on the grounds that this Court lacks subject matter jurisdiction; that the complaint fails to state a claim upon which relief can be granted; and that plaintiff improperly served certain of the defendants, and (2) a motion by the four other defendants for an order dismissing the complaint pursuant to Rule 12(b) on the grounds that this Court lacks subject matter jurisdiction; that this Court lacks personal jurisdiction over them; and that the complaint fails to state a claim upon which relief can

be granted. These defendants also request an award of costs.

Plaintiff seeks compensatory damages of $100,000 together with punitive damages against all defendants. Plaintiff alleges, inter alia, that, while in the course of their official duties as either surrogate of Queens County or as justices of the state Supreme Court or as clerks or law assistants thereof, the various so-called State Defendants, purportedly in excess of their authority, either rejected, wrongfully decided or otherwise conspired to wrongfully decide certain applications brought by plaintiff, as attorney for the Executors of the Estate of Pearl S. Sherburne, to resolve a dispute between the executors and the legatees as to who was to manage the testator's residence in which the legatees came to reside. He alleges that, by reason of unconstitutional and illegal decisions of the various courts in connection with this action and as a result of their failure to perform their duties properly,

"the executors have suffered damages and this plaintiff has suffered damages and injury by being deprived of his constitutional rights to represent his client, to espouse their causes, and to prosecute their rights in proper and lawful manner."

In support of their motion to dismiss, the defendants who are not court officers contend that plaintiff has failed to establish a constitutional claim against them of sufficient substance to support federal jurisdiction. In addition, these defendants argue that, since the complaint makes no showing that the State Defendants (the judges and clerks of the court) were acting outside the ambit of their official function so as to subject them to liability, they cannot be joined as "willful participants" in a conspiracy with the state officials.

The defendants who are not court officers assert that plaintiff has no standing to sue on behalf of the executors.

For the reasons set forth below, plaintiff's complaint is dismissed.

Before addressing the merits of plaintiff's claims, the Court must determine whether plaintiff has standing to maintain this action. The concept of standing encompasses both constitutional requirements and jurisprudential pricniples that ensure that federal courts decide only "cases" or "controversies" as mandated by Article III. Valley Forge Christian College v. Americans for Separation of Church and State, Inc., 454 U.S. 462, 471 (1982). The basic constitutional requirement is that plaintiff must demonstrate "injury in fact" -- that is, that he has sustained or is in imminent danger of sustaining injury as a result of the challenged conduct of the defendant. Valley Forge, supra at 472; Weiss v. Feigenbaum, 558 F. Supp. 265, 274 (E.D.N.Y. 1982). The plaintiff must also show that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." Valley Forge, supra at 472, quoting Simmon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41,

(1976). Moreover, as a prudential matter, the interests plaintiff seeks to vindicate must be "within the zone of interests to be protected by the statute or constitutional guarantee in question." Association of Data Processing Services Orgs. v. Camp, 397 U.S. 150, 153 (1970). Finally, the complaint must be based on plaintiff's own rights, not those of third parties, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Warth v. Seldin, 422 U.S. 490, 499 (1975), although certain exceptions have gradually been engrafted upon this rule. E.G., Griswold v. Connecticut, 381 U.S. 479 (1965).

Plaintiff's complaint and papers fail to allege a concrete, personalized, direct and demonstrable interest in the outcome of the suit. Moreover, plaintiff is not the proper proponent of the particular legal rights on which the suit it based. The allegedly unconstitutional and illegal decisions taken by the various courts and court officers allegedly in collusion with others and adverse

to plaintiff's clients may have resulted in an injury in fact to plaintiff's clients but not to the plaintiff. Cf. Valley Forge, supra, 454 U.S. 464. Even if the actions of their absolute immunity, a highly questionable proposition, see Stump v. Sparkman, 435 U.S. 349 (1978); Weiss v. Feigenbaum, supra, 558 F. Supp. at 272, to hold that an attorney suffers injury because a court decided matters adverse to his client would be an unwarranted departure from the traditional strictures of the standing doctrine.[1/]

To the extent that plaintiff seeks standing to assert the rights of third parties, the executors, plaintiff has not demonstrated that he falls outside the general rule that a claim for relief cannot rest on the legal rights or interests of third parties. Courts have fashioned discrete exceptions to this general rule where a violation of a third-party's rights adversely affect a relationship that exists between

the party and the plaintiff, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), or where Contress grants a class of plaintiffs standing to assert the rights of third parties. Warth v. Seldin, supra, 422 U.S. at 501; Huertus v. East River Housing Corp., 81 F.R.D. 641, 646 (S.D.N.Y. 1979). See generally Griswold v. Connecticut, supra; Pierce v. Society of Sisters, 268 U.S. 510 (1925); NAACP v. Alabama, 357 U.S. 449 (1958). None of the situations involved in these cases is even remotely similar to the one at bar. See In re Agent Orange Product Liability Litigation, 96 F.R.D. 578 (E.D.N.Y. 1983); Kuck v. Berkey Photo, 85 F.R.D. 79 (S.D.N.Y. 1979).

Pursuant to 42 U.S.C. Sec. 1988, "the prevailing party, other than the United States" in civil rights actions may be awarded attorneys' fees. The Court may, in its discretion, award attorneys' fees to a defendant if the action if frivolous, unreasonable or without foundation.

Harbulak v. County of Suffolk, 654 F.2d 194, 196 (2d Cir. 1981); Gerena-Valentin v. Koch, 554 F. Supp. 1017, 1021 (S.D.N.Y. 1983).

Defendants' request for attorneys' are denied. While plaintiff's claims of standing are certainly unusual, they are not so frivolous as to warrant the award of fees, especially since there is some support for this position. See Wounded Knee Legal Defense/Offense Committee v. FBI, 507 F.2d 1281 (8th Cir. 1974). In addition, since the case is being terminated at an early stage of the litigation, the underlying merits of plaintiff's claims have not been assessed and may, in fact, be substantial.

Accordingly, for the reasons set forth above, defendants' motions are granted, except as to the motion for attorneys' fees, which is denied.

The Clerk is directed to enter judgment dismissing the complaint and to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, N.Y.
Feb. 1, 1984

U.S. D.J.

FOOTNOTE

1/ Plaintiff relies principally on two cases for his standing argument. First, in Keker v. Procunier, 398 F. Supp. 756 (E.D. Ca. 1975), a district court for the Eastern District of California held that an attorney has standing to challenge prison practices regulating attorney-client meetings. Also, in Wounded Knee Legal Defense/Offense Committee v. FBI, 507 F.2d 1281 (8th Cir. 1974), the Court of Appeals held that attorneys had standing to challenge FBI harassment of their meetings with their clients, noting that "a lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through his lawyer, invades the client's constitutional right to counsel." Id. at 1284. While broad dicta in these two cases provide limited support for plaintiff's position, either present the clearly distinguishable situation of an

attorney challenging a court decision directly affecting not himself or his confidential relations with his client.

DECISION OF SIFTON DC. J.
ON REARGUMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

CV-83-3984

DECISION
AND ORDER

ANTHONY B. CATALDO,

Plaintiff.

-against-

LOUIS D. LAURINO et alia,

Defendants.
----------X

SIFTON, District Judge.

Plaintiff in this action brought pursuant to 42 U.S.C. Sec. 1983, alleges that various defendants, including various judges and court officers who presided over proceedings brought by plaintiff on behalf of the executors of an estate, participated in a conspiracy to violate his due process rights. The matter is now before the Court on a motion by

plaintiff for reargument of the dismissal of plaintiff's action for lack of standing.[1/]

The only proper ground for a motion for reargument is that the Court overlooked "matters or controlling decisions" which, had they been considered, might reasonably have altered the earlier result reached by the Court. United States v. IBM, 79 F.R.D. 412 (S.D.N.Y. 1978).[2/] Here, plaintiff has merely resubmitted arguments this Court was aware of and already rejected. Plaintiff's new argument that he need not satisfy any standing requirements is frivolous. Accordingly, the motion is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, N.Y.
February 28, 1984

U.S. District Judge

DECISION OF THE HON. CHARLES P. SIFTON DATED APRIL 12, 1984, DENYING PLAINTIFF'S MOTION TO AMEND, AS DICTATED TO THE COURT STENOGRAPHER

THE COURT: I don't find a basis for jurisdiction. I think the case law is clear that under 28, U.S.C. Section 1291, the filing of the timely notice of appeal immediately transfers jurisdiction to the Court of Appeals.

The matter is discussed, among other places in State of New York against the Nuclear Regulatory Commission, 550 F 2d 745, and in Moore's, Paragraph 203.11, Vol. 9.

The only exceptions to this are extremely limited. One of them I have already pointed out, Rule 60(a), and none of them apply here. The mischief which would occur if district judges were considering or reconsidering the merits of their own decisions at the same time that they were being considered by the

Appellate Court has been amply laid out in Appellate Court decisions.

If there is some error in what I have done, there is a Court of Appeals to correct it. If the matter is remanded to me, I will simply hear any application that is made, either to amend the complaint or to vacate the judgment previously entered. But, the application for elief sought now is denied as outside my jurisdiction to grant.

DECISION OF COURT OF APPEALS OPINIONS OF MAJORITY AND MINORITY OPINIONS IN CARGO DAMAGE SUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 473, 580 August Term, 1981

(Argued January 25, 1982 Decided April 12, 1982)

Docket Nos. 80-7003, 81-7353

M. W. ZACK METAL CO.,

Plaintiff-Appellant-Cross-Appellee,

v.

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & CO., CONTAM LINEIE, HANS H. JANSEN, JURGEN K. KRAFFT, NEW-CASTLE PROTECTION & INDEMNITY ASSOCIA-TION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION, LTD.,

Defendants-Appellees.

NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S INSURANCE ASSOCIATION LIMITED,

Defendants-Appellees-Cross-Appellants.

B e f o r e : MESKILL and CARDAMONE, Circuit Judges and HOLDEN, District Judge.*

---

* Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

Appeal from a judgment entered by the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, dismissing M. W. Zack Metal Co.'s complaint which sought recovery for cargo damage and for fraud, and cross-appeal by Newcastle Protection & Indemnity Association and the London Steamship Owner's Mutual Insurance Association Limited from dismissal of their counterclaim alleging malicious prosecution and abuse of process.

Affirmed. Judge Cardamone filed an opinion concurring in part and dissenting in part.

ANTHONY B. CATALDO, New York, New York for Plaintiff-Appellant.

DONALD B. ALLEN, New York, New York (Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, New York, New York, of counsel), for Defendants-Appellees-Cross-Appellants.

Robert W. Mullen, Dickerson, Reilly & Mullen, New York, New York, for Defendants-Appellees.

MESKILL, Circuit Judge:

M. W. Zack Metal Company ("Zack") appeals from a judgment entered by the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, dismissing its complaint, which sought recovery for cargo damage and for fraud. Newcastle Protection & Indemnity Association and the London Steamship Owner's Mutual Insurance Association Limited (the "Insurers") cross-appeal from Judge Sweet's dismissal of their counterclaim for malicious prosecution and abuse of process. For the reasons set forth below, we affirm the district court's decision in all respects.

BACKGROUND

Zack comes before this Court with a matter that was first litigated over twenty-two years ago and that has consumed an inordinate amount of the resources of courts in this country and abroad. The facts and procedural history of the dispute are as follows:

On January 18, 1960, Zack purchased ninety-three coils of Austrian hot rolled steel which it had contracted to sell in the United States to Dearborn Steel Sales, Inc. The steel was

shipped under a clean bill of lading from Belgium to New York aboard the S.S. SEVERN RIVER, a vessel owned by International Navigation Corporation of Monrovia ("International"), a Liberian corporation, and under charter to Jansen & Co. (the "Charterer"), a German partnership. The steel was damaged in transit and, after Dearborn Steel refused to accept shipment, was sold by Zack to a German company for approximately one-half of Zack's cost.[1/]

On February 11, 1960, Zack commenced suit against the SEVERN RIVER and the Charterer in the United States District Court for the Southern District of New York seeking to recover $80,000 in damages, the difference between the market value of the steel in good condition and its salvage value less resale expenses. That action was dismissed without prejudice for failure to prosecute, service having never been effected on any of the defendants. Thereafter, on January 27, 1961, Zack sent a letter to the Charterer's agent in New York, Oceanica of Canada Ltd., requesting an extension until May 15, 1961 of the limitations period under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1303(6) (1976).[2/]

Oceanica granted Zack's request.

Three days before the extension was due to expire, Zack filed identical actions for the cargo loss in the United States District Court for the District of New Jersey and the United States District Court for the Eastern District of New York. The following day, Zack filed a similar action in the County Court for Commercial Affairs in Hamburg, Germany. Both district court cases were dismissed for failure to prosecute.

While the German case was pending, Zack brought an actin in New York State Supreme Court against its cargo underwriter, Federal Insurance Company ("Federal") to recover for the cargo loss. On March 14, 1968, after two trials and two appeals, and during a third trial, a settlement was reached under which Zack received $40,000 on the cargo damage claim plus $19,453 in interest.[3/] The settlement also permitted Zack to continue the action in Germany provided that Federal received fifty-five percent of any net recovery.

In 1970 the Insurers, indemnity insurers of the Charterer and International, purchased Federal's interest in the outcome of the German

litigation. Zack then commenced an action against the Insurer's charging them with fraud in purchasing Federal's interest. Zack represents that this action is still pending.

On December 7, 1971, after ten years of litigation, the German trial court found the Charterer, its partners and International liable to Zack for $64,000 plus interest and costs.[4/] International's liability was limited to execution upon the SEVERN RIVER, which, unknown to the German court, had foundered at sea some three years earlier.

Later in 1971, Newcastle, in an effort to forestall execution on the judgment pending the outcome of an appeal, signed a guarantee of satisfaction of payment to Zack to become operative upon either the entry of a final decision by the German courts or upon a settlement agreement. During the pendency of the appellate proceedings in Germany, Zack filed suit in the United States District Court for the Eastern District of Virginia seeking to recover against International by attaching one of its vessels, the VIRTUS, in Norfolk. Zack asserted that the attachment action was proper because the SEVERN RIVER had

foundered at sea some three years earlier.

Later in 1971, Newcastle, in an effort to forestall execution on the judgment pending the outcome of an appeal, signed a guarantee of satisfaction of payment to Zack to become operative upon either the entry of a final decision by the German courts or upon a settlement agreement. During the pendency of the appellate proceedings in Germany, Zack filed suit in the United States District Court for the Eastern District of Virginia seeking to recover against International by attaching one of its vessels, the VIRTUS, in Norfolk. Zack asserted that the attachment action was proper because the SEVERN RIVER had run aground. The attachment order was eventually vacated and the suit dismissed. On appeal, the Fourth Circuit reaffirmed the dismissal, holding that because the German judgment was "in rem" against the SEVERN RIVER, it "furnish[ed] no basis for the assertion of an in personam liability of the owner or the attachment of any other vessel owned by International." M. W. Zack Metal Co. v. International Navigation Corp., 510 F.2d 451, 452-53 (4th Cir.), cert. denied, 423 U.S. 835 (1975).

On January 9, 1975, the Hanseatic Provincial Court of Appeals in Germany dismissed Zack's claim against International, finding that the written extension of time to sue from February 16 to May 15, 1961 given to Zack by the Charterer's agent in New York did not bind International, causing Zack's claim against the shipowner to be time-barred under COGSA, 46 U.S.C. Sec. 1303(6), and applicable German law. In addition, while the court found that the Charterer and its partners were liable for the cargo damage, it reduced their liability to $33,000 plus interest and costs.[5/] Thereafter, the Insurers posted a bond to guarantee satisfaction of payment of the Charterer's liability and a lien to protect its interest in Zack's recovery. Zack has yet to execute on the judgment of the German appeals court.

In 1976, Zack moved in the United States District court for the District of New Jesey to have its claim against the SEVERN RIVER restored to the docket. The district court denied the motion and the Third Circuit affirmed. M.W. Zack Metal Co. v. S.S. Severn River, No. 386-61 (D.N.J. Oct. 19, 1976), aff'd by order, 577 F.2d 727 (3d Cir.), cert. denied, 439 U.S. 894 (1978).

Zack filed the instant action in the United States District Court for the Southern District of New York on July 31, 1978 alleging five causes of action. The first three prayed for recovery for cargo damage against International the Charterer, the Charterer and Newcastle, and International and London, respectively. The fourth pleaded for collection upon Newcastle's written guarantee of satisfaction. The final cause of action sought damages against the Insurers for fraud. Zack alleged that International and the Charterer, through attorneys retained by the Insurers, defrauded the courts which had rendered decisions on Zack's cargo damage claims by misstating the law and withholding operative facts. The defendants counter claimed, charging Zack with malicious prosecution and abuse of process for failing to reduce its claim to judgment in the German courts and for instituting the subsequent actions in the United States.

The district court, on defendants' motion pursuant to Fed. R. Civ. P. 12(b)(6), dismissed all of Zack's claims except for that which sought recovery on the Newcastle guarantee. Judge Sweet found that the cargo damage claims were barred

by the one year limitations period in COGSA, 46 U.S.C. Sec. 1303(6), having been brought eighteen years after delivery of the goods. Judge Sweet found that each of Zack's claims for fraud could be presented only in the court where the fraud was allegedly perpetrated. Alternatively, the court held that an independent action for fraud will lie where, as here, the party alleging fraud had an opportunity to raise these claims in prior proceedings, or where the allegations involve intrinsic fraud.

Following a two-day trial, the district court also dismissed Zack's claim on the Newcastle guarantee without prejudice, finding that Zack had failed to prove that the determination of the Hanseatic Provincial Court in Germany was a "final decision" within the meaning of the guarantee. In addition, the court dismissed defendants' counterclaim holding that Zack's counsel acted in good faith and, therefore, did not possess the required scienter for malicious prosecution or abuse of process.

DISCUSSION

Zack alleges on appeal that its claims for cargo damage are not time-barred; that it presented

sufficient evidence that the Charterer and Newcastle are presently obligated under the Newcastle guarantee to pay Zack $110,000 in damages; and that it may maintain an independent action in federal district court for fraud committed by the Insurers in prior litigation concerning the cargo damage claim. The Insurers contend that the district court erred in dismissing their malicious prosecution and abuse of process counterclaims and in failing to dismiss Zack's claim on the Newcastle guarantee with prejudice.

Zack first contends that the district court erred in dismissing as time-barred its claims for recovery for cargo damage. The pertinent section of COGSA provides that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." 46 U.S.C. Sec. 1303(6). The complaint in this action was filed eighteen years after the SEVERN RIVER arrived in New York with the damaged goods. Zack asserts, however, that it complied with the COGSA's statute of limitations by bringing suit in district court in February 1961. This

claim is frivolous. The mere filing of a suit by Zack within the limitations period did not forever toll COGSA's statute of limitations. Because this suit was not brought within the one year period, Zack is barred from raising these cargo damage claims. See Instituto Cubano De Estabilizacion Del Azucar v. T/V Golden West, 246 F.2d 802, 804 (2d Cir.), cert. denied, 355 U.S. 884 (1957); Badhwar v. Colorado Fuel & Iron Corp., 245 F.2d 903, 907 (2d Cir.), cert. denied, 355 U.S. 862 (1957); Joo Seng Hong Kong Co. v. S.S. Unibulkfir, 493 F.Supp. 35, 39 (S.D.N.Y. 1980).

Zack next alleges that the district court erred in dismissing its claim against the Insurers for fraud allegedly penetrated on the various courts which had rendered decisions on its cargo damage claim. The district court characterized this claim as an independent action for fraud under the saving clause of Fed. R. Civ. P. 60(b).[6/] Zack's allegations that Insurer's counsel perpetrated fraud upon the various courts arguably fits within the savings clause and is not time-barred. See generally Serzysko v. Chase Manhattan Bank, 461

F.2d at 702 n.2. See Marshall v. Holmes, 141 U.S. 589, 596 (1891). Here, Zack had prior opportunitie to raise its fraud claims. For example, Zack alleges that the Insurers fraudulently concealed from the German trial court their knowledge that the SEVERN RIVER had run aground. Zack has had ample opportunity to raise this claim before the German appeals court. Further, Zack actually raised this argument, though unsuccessfully, in the United States District Court for the District of Virginia in its attachment action against the VIRTUS. Zack also had a chance to raise this claim in its appeal to the Fourth Circuit. Likewise, Zack had the opportunity in both German courts and did try to prove there that the extension of time to sue granted by the Charterer's agent in New York also bound the shipowner. Its claim that the Insurers failed to disclose to it and the courts facts which indicated that COGSA's time-bar covered International, even if true, "does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b)." Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 837 (5th Cir. 1980). See H. K. Porter Co. v.

Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118 (6th Cir. 1976); Kupferman v. Consolidated Research & Manufacturing Corp., 459 F.2d 1072, 1080-81 (2d Cir. 1972). Further, we see no reason why the documents that Zack presented below in support of this claim could not have been presented in the prior proceedings. See Konigsberg v. Security National Bank, 66 F.R.D. 439, 442-43 (S.D.N.Y. 1975).

Having found that the district court did not err in dismissing Zack's independent action for fraud because Zack had an opportunity to raise thes claims in prior proceedings, we need not determine whether the claim is also invalid because each allegation of fraud is intrinsic to these other proceedings. See United States v. Throckmorton, 98 U.S. 61, 68 (1878); 7 J. Moore Federal Practice Par. 60.37[1] (2d ed. 1979).

Finally, Zack contends that the district court erred in dismissing without prejudice its claim for $110,000 from the Insurers under the terms of the Newcastle guarantee.[7/] The district court, although recognizing that "some money is owed by the defendants to plaintiff," dis-

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missed this claim because Zack had failed to establish "the entry of or the amount of a final judgment in the German courts." Zack asserts that it presented sufficient evidence below, specifically the Newcastle guarantee and a translated copy of the decision of the Hanseatic Provincia Court in Germany, to establish a present right to recover under the guarantee. We disagree. Zack's evidence established only that the Hanseatic Provincial Court had assessed damages of $33,000 against the Charterer. Zack presented no evidence that an accounting of costs and interest had ever been made by the German appeals court. Accordingly, we agree with the district court that Zack has failed to prove that a "final decision" for purposes of the guarantee has been entered in Germany.[8/]

The Insurers' cross-appeal from a dismissal of their counterclaims charging abuse of process and malicious prosecution by Zak in faiing to reduce the decision of the Hanseatic Provincial Court to judgment and in instituting this and other suits. The district court found taht while Zack's counsel is "incompetent," he acted in good faith and therefore did not possess the

necessary scienter to be held liable. The Insurer's sold argument is that anyone who filed so many suits over this one simple damage claim must, as a matter of law, have acted in bad faith. We do not approve of the scatter shot approach taken by Zack's counsel over the last twenty-two years in seeking to recover for the cargo loss. We do not know, however, whethr it should be attributed to incompetence or bad faith. Therefore we hold that the district court's finding that appellant's counsel acted in good faith was not clearly errneous. Fed. R. Civ. P. 52(a).

Affirmed. Cost to the defendants-appellees.

FOOTNOTES

1/ The damaged steel was sold for $42,977.98. Zack claimed that its cost of resale amounted to $12,833.58.

2/ Clause 1 of the bill of lading provided that the shipment was subject to the Carriage of Goods by Sea Act.

3/ The two opinions on appeal, in the action captioned M. W. Zack Metal Co. v. Federal Insurance Co., are reported at 26 A.D.2d

54, 271 N.Y.S.2d 1 (1st Dep't 1966) and 28 A.D.2d 1109, 284 N.Y.S.2d 582 (1st Dep't 1967).

4/ Clause 19 of the billof lading limited losee to $500 per package or per customary freight unit. Of course COGSA's package limitation, 47 Y.S.C. Sec. 1304(5), would apply regardless of this clause. See 46 U.S.C. Sec. 1312. The German trial court computed damages based upon $500 per unit of 1,000 kilograms.

5/ Damages were computed on the basis of $500 per damaged coil. The court determined that 66 coils had been damaged in transit.

6/ Fed. R. Civ. P. 60(b) provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5)

the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment shold have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to defendant not actually personally notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the court.

(emphasis added.)

7/ The guarantee stated:

> The undersigned company herewith guarantees to pay upon first request the agreed sum, plus interest and costs, in the amount to which the plaintiff is entitled pursuant to a final decision of the German courts or on basis of a settlement agreement.

App. at 612.

8/ On appeal, the Insurers contend that the district court should have dismissed this cause of action "with prejudice." However, if an accounting of costs and interest is made by the German appeals court, Zack would presumably be entitled to recover on the guarantee.

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Zack v. Newcastle

CARDAMONE, Circuit Judge (concurring in part, dissenting in part)

The majority votes to affirm the dismissal of the plaintiff's first, second and third causes of actions and to affirm the dismissal of defendant's counterclaim. I concur in those affirmances. However, the majority also votes to affirm the dismissal of plaintiff's fourth and fifth causes of action. From those dispositions I respectfully dissent and vote to reverse and remand the fourth cause of action and to remand for trial the fifth cause of action which alleges fraud on the court.

Turning first to plaintiff's fourth cause of action, Zack obtained a "final decision" suf-

ficient to activate Newcastle's liability under the terms of its written guarantee. That guarantee stated: "The undersigned company herewith guarantees to pay upon first request the agreed sum, plus interest and costs in the amount to which the plaintiff is entitled pursuant to a final decision of the German courts or on basis of a settlement agreement." Appellant's Appendix at 612. In my view the condition of the guarantee has been met and plaintiff is entitled to its benefit.

The majority does not dispute the finality of the German court judgment. It simply holds that since plaintiff has presented no evidence of an accounting of costs and interest there is a failure to prove that a "final decision" has been entered.

Concededly it is possible to construe the guarantee as requiring that "final decisions" include "interest and costs" as determined by the German courts because the reference to that court follows that language. It may, on the other hand, be understood that Newcastle guaranteed to pay the "agreed sum, plus interest" when determined by a "final decision" of the German courts

and guaranteed by pay Zack its "costs" when they are finally determined. Interest was fixed in the German judgment at 5% per annum from February 10, 1961. Judicial and etrajudicial costs are ordinarily computed later under German law and are presently in litigation in Germany. Nothing in the guarantee requires that there be a final decision as to costs prior to enforcing the guarantee on the agreed sum plus interest. At most there is an ambiguity in the guarantee which, of course, must be construed against defendant Newcastle, its drafter, in favor of plaintiff, its beneficiary.

Once the Hanseatic Provincial Court of Appeals in Germany handed down its 60-page decision awarding plaintiff $33,000 plus interest, plaintiff had a right to bring suit on the guarantee in the United States District Court to enforce it. The German court had jurisdiction over the parties and subject matter. Its final judgment, unless tained by fraud or barred by the rules of comity, is entitled to full credit and effect. Hilton v. Guyot, 159 U.S. 113 (1895). A final decision of the German court, under the rules of comity,

should be enforced in the courts of the United States.

Further, this case should be returned to the district court for trial on the independent equitable action for fraud on the court asserted in plaintiff's fifth cause of action. Nothing corrupts the administration of justice so much as a deliberate fraud on a court. Its odiousness, undissipated by the passage of time, lingers like a miasma. It is alleged that we have such a case before us. While the affirmance by the majority of the trial court's dismissal will end this case, it will not - if the allegations of plaintiff's complaint are true - remedy the damaging effects of a claim of fraud now buried in the darkness of a dismissal.

Plaitiff's fifth cause of action asserts an independent equitable action for fraud practiced on courts in the United States and Germany commencing in 1960. The action was instituted in the Southern District of New York on June 31, 1978. The district court and the majority relying upon United States v. Throckmorton, 98 U.S. 61 (1878), held that plaintiff's fifth cause of

action alleging fraud upon the court, which it characterized as essentially a collateral attack on the previously rendered decision, must be made in the various courts which were allegedly defrauded. Decisions of the Supreme Court since Throckmorton were decided in 1878 indicate that the rationale of that case is no longer persuasive. In Throckmorton the Supreme Court used res judicata as the legal device to defeat an action based on an old fraud practiced on a court. The rationale upon which the decision was based appears to be the Court's view that suits may be immortal, but men are not. Id. 69. Thirteen years later the Supreme Court in Marshall v. Holmes, 141 U.S. 589 (1891), permitted an equitable action to be filed where it was against conscience to permit a judgment obtained by claimed fraud to be executed. This time the Court stated that a court, while not sitting in review, should scrutinize the conduct of the parties in a new proceeding to determine if one used fraud to obtain a judgment. If so, the court will deprive him of the benefit of the judgment and any equitable advantage gained. Id. at 599. The view that

"truth is more important than the trouble it takes to get it," set forth in Publicker v. Shallcross, 106 F.2d 949, 952 (3d Cir. 1939) is consistent with Marshall, which Publicker cites at 951.

These two Supreme Court cases afforded ample latitutde to lower courts for over 50 years to decide equitable causes of alleged fraud on the courts in whatever way their own predilections led them. More recently the Supreme Court decided Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). In that case the trial in which the alleged fraud occurred took place in 1929, but the fraud was not fully brought to light until 1941. The Supreme Court said, in discussing the independent equitable action of fraud on the court, that "equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable itnervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." Id. at 248. Based upon this historical progression, I conclude that the harsh rule of Throckmorton

is not the current view of the Supreme Court.

Thus, it is now established that this type of action should be governed by flexibility to afford necessary relief. The district court in granting summary judgment dismissing this cause of action did not examine the facts, but merely concluded that plaintiff was in the wrong forum. However, its power to entertain this action is not limited where there is a claim of fraud upon a court. Fed. R. Civ. P. 60(b). In this case the fraud should have been explored at trial, particularly since on a motion to dismiss all of the plaintiff's allegations of fraud are deemed to be true.

The majority depicts plaintiff as bringing a multitude of vexatious suits. However, Newcastle's behavior from the outset of this sage over 20 years ago reveals a callous disregard for the truth. For example, it led the District Court in Hamburg to exercise in rem jurisdiction over a ship the court was told was siling on the high seas when in fact Newcastle knew that the SEVERN RIVER was under the high seas - it had sunk. Its orchestrated tactics - extending

even to buying the subrogation rights of Zack's American insurer on the damaged cargo claim and using it as a basis to slap a lien on the German judgment to prevent Zack from executing it, and then cooly arguing that Zack did not have a "final decision" from the German court because it had not entered judgment and exeucted on it - have frustrated plaitiff at each and every turn. In my review plaintiff is entitled on the law to have its day in court.

SAME CAPTION

Order Amending Opinion

It is hereby ORDERED:

1. The sentence on page 2124 of the opinion reading:

> On February 11, 1960, Zack commenced suit against SEVERN RIVER and the Charterer in the United States District Court for the Southern District of New York seeking to recover $80,000 in damages, the difference between the market value of the steel in good condition and its salvage value less resale and expenses.

is modified to read:

> On February 11, 1961, Zack commenced suit against the SEVERN RIVER and the

Charterer in the United States District Court for the Southern District of New York seeking to recover $80,000 in damages, the difference between the market value of the steel in good condition and its salvage value less resale expenses.

2. The sentence on page 2123 of the opinion reading:

> Thereafter, on January 27, 1961, Zack sent a letter to the Charterer's agent in New York, Oceana of Canada Ltd., requesting an extension until May 15, 1961 of the limitations period under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Sec. 1303(6) (1976).2/

is modified to read:

> On January 27, 1961, Zack had sent a letter to the Charterer's agent in New York, Oceana of Canada Ltd., requesting an extention until May 15, 1961 of the limitations period under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Sec. 1303(6) (1976). 2/

Thomas J. Meskill, U.S.C.J.

Richard J. Cardamone, U.S.C.J.

James S. Holden, U.S.D.J.

SAME CAPTION

ORDER DENYING REHEARING

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, M. W. Zack Metal Co.,

Upon consideration by the panel that heard the panel, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

_____

Francis X. Gindhart
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

M.W. ZACK METAL CO.,

Plaintiff,

-against-

INTERNATIONAL NAVIGATION CORPORATION OF MONTOVIA, JANSEN & CO.; CONTAM LINIE; HANS H. JANSEN; JURGEN K. KRAFFT: NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION; THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED,

Defendants.

----------x

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R.W.S.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION

DECISION SWEET, D.J. DISMISSING ~~FIRST~~ FOUR CAUSES OF ACTIONS OF COMPLAINT ON MOTION FOR SUMMARY JUDGMENT

Sweet, D.J.

Plaintiff M. W. ZackMetal Co. ("Zack") brought this action in July, 1978, principally under the court's admiralty jurisdiction, based on a cargo damage claim which just marked its twenty-first anniversary. The claim - or at least a portion of it - passes that milestone, as all of the issues in the current chapter of this litigation could not be resolved on defendants' motion to dismiss. However, that motion will be granted with respect to the first, second, third and fifth causes of action, which will be dismissed.

On February 16, 1960 the S.S. Severn River (the "Severn River"), owned by defendant Intternational Navigation Corporation of Monrovia ("International"), a Liberian corporation, and under charter to defendant Jansen & Co.,Contam Linie ("Contam Linie"), a German partnership,[1] discharged in New York[2] 93 coils of hot-rolled steel ("the steel") belonging to Zack. The steel had been loaded at Antwerp, Belgium on a clean bill of lading signed ;by the vessel's master, but upon arrival was found to be damaged. Zack calculated a loss of approximately $80,000, the market value of the steel being $110,000 and the net salvage value $30,000. After unsuccessful efforts at settling the dispute, a mass of litigation in this and other courts followed,

the outlines of which must be recounted here in order that the instant complaint, alleging five causes of action, be fully understood.

On or about February 11, 1961 Zack commenced a suit on the cargo claim in this court against the Severn River, Contam Linie and Jansen. That action apparently was dismissed without prejudice for failure to prosecute, service not having been effected on any of the defendants. On or about May 12, 1961 a similar action was commenced in the United States District Court for the District of New Jersey; it was subsequently dismissed, apparently for the same reason. On or about May 13, 1961 an action was commenced by Zack in the County Court for Commercial Affairs in Hamburg, Germany, naming as defendants International, Contam Linie, Jansen and Krafft. The German action was litigated at the trial level for ten years. With the third and final decision of that court on December 7, 1971, Contam Linie, the partners and International had been found liable to Zack in the amount of approximately $64,000 plus interest from February 1960 and part of Zack's costs. International's liability was limited to execution upon the Severn River, Zack's claim against that defendant being otherwise dismissed.[3] Both sides appealed from that determination.

In the meantime, in November, 1961 Zack had brought an action against its cargo underwriter, Federal Insurance Company ("Federal"), on the damage claim in New York State Supreme Court. That litigation also spanned the decade. After two trials and appeals,[4] and part way into a third trial, a settlement was reached on March 14, 1968 whereby Zack apparently received $40,171 plus interest. Additionally, the parties agreed that Zack would continue to prosecute its action in Germany and pay to Federal 55% of any net recovery. The London Steamship Owner's Mutual Insurance Association, Ltd. ("London"), and Newcastle Protection & Indemnity Association ("Newcastle"), the insurers of International and Contam Linie respectively, and defendants in the instant action (collectively "the insurers"), subsequently purchased from Federal its interest in the outcome of the German litigation.[5]

In November, 1971, after the German trial court had already declared the liability of Contam Linie and the partners, to forestall execution on the judgment Newcastle, which along with London had apparently been involved in the defense of that action, signed a guarantee of satisfaction of payment of the award to Zack, conditioned on a final decision of the German

courts or a settlement agreement.

With appellate proceedings underwayin Hamburg, in 1972 Zack filed suit on the same claim in the United States District Court for the Eastern District of Virginia, causing to be attached for purposes of that suit a different vessel owned by International which had put into Norfolk. The vessel was released after International posted security, and the suit ultimately was dismissed. In affirming, the Court of Appeals for the Fourth Circuit held:

> It may be that the (German) appellate court will impose some other liability upon (International), but it is plain that the (German) trial court limited (International's) liability to its interest in the Severn River. Essentially and substantively, it is an in rem judgment against the Severn River, imposing no in personam liability against its owner, and furnishing no basis for the assertion of an in personam liability on the owner or the attachment of any other vessel owned by International. The attachment, of course, may not be based upon the speculative possibility that the reviewing court in Germany may give Zack greater rights against (International) than the trial court did.

M.W. Zack Metal v. International Navigation Corp., 510 F.2d 451, 452-53 (4th Cir.), cert. denied, 423 U.S. 835 (1975).

Actually, it seems that on January 9, 1975 the Hanseatic Provincial Court of Appeals in

Germany had rendered its opinion. That court dismissed altogether Zack's claim against International, on the basis of the one year time bar on cargo damage claims under the Carriage of Goods by Sea Act ("COGSA") 46 U.S.C. §§ 1303(6) and applicable German law, ruling that a written extension of the deadline to sue from February 16 to May 15, 1961, given Zack from Oceania of Canada, Ltd., Contam Linie's agent in New York, did not bind International as well (the German suit having been filed on May 13, 1961); further, the court reduced the damages against Contam Linie and the partners, the remaining defendants, to $33,000 plus interest and part of Zack's costs. The court considered the matter of Federal's right to the 55% set-off which had been assigned to the insurers, but apparently decided that any claims based thereon should be asserted only after the decision on the primary claim was rendered. Thereafter, Newcastle apparently posted a bond to guarantee satisfaction of payment of the charterers' liability, and filed what is characterized as a lien to protect its 55% interest in Zack's recovery. The present, however, Zack has not executed on what is here loosely termed the "judgment" of the German appeals court,[6] and no money has changed hands among

the interested parties in Germany, the parties having been unable to agree on the proper amounts for the various payments - taking into consideration attorneys' fees and costs - under the terms of the decision of the appeals court and of the Zack-Federal settlement (and the later assignment to the insurers).

In 1976, Zack moved in the United States District Court in New Jersey to have the libel against the Severn River - which it had brought (and had been dismissed) on the cargo claim several years before in that court - restored to the docket as an in personam action against International and perhaps other defendants. That motion was denied, and the decision of the district court affirmed on appeal.

Finally[7] (at least for the time being), the instant action was filed on June 30, 1978. The named defendants are Contam Linie and the partners (collectively "the charterers"), International, and the insurers. The insurers and Krafft have effectively been served, and appeared. Service on International has been attempted through an agent in Baltimore and a freight forwarder in Monaco; International has appeared specially, reserving the defense of lack of in personam jurisdiction.

Zack's complaint alleges five causes of

action: (1) against International and the charterers for breach of the terms of the bill of lading; (2) against the charterers and Newcastle to pay the cargo damages; (3) against International and London to pay the cargo damages; (4) against the charterers and Newcastle to honor the guarantee of satisfaction of the German judgment entered into by Newcaastle; (5) against the insurers for alleged fraud perpetrated on the various courts which have rendered decisions during the protracted multi-faceted litigation of Zack's claim.

In support of the motion to dismiss the various causes of action, defendants urge the court to apply applicable statutes of limitations and the principles of laches and res judicata; International presses as well this court's lack of personal jurisdiction over it.[8] Zack in turn moves for summary judgment. For the reasons stated below, all claims of Zack against all defendants are dismissed, with the exception of the fourth cause of action against Newcastle on its guarantee of satisfaction of the German judgment.

The instant action was filed more than eighteen years after the Severn River delivered the damaged steel. COGSA, 46 U.S.C 1303(6), which undisputedly applies to the cargo claim,

provides in pertinent part: "In any event the carrier and the ship shall be disharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods..." See United States v. The South Star, 210 F.2d 44 (2d Cir. 1954); Monarch Industrial Corp. v. American Motori s Ins. Co., 276 F. Supp. 972, 979 (S.D.N.Y. 1967). Zack urges that the terms of the COGSA time bar have been satisfied by its previous filing of a libel on the same cargo damage claim in this court on February 11, 1961 (an action which subsequently was dismissed), and by its dogged litigation of the claim in various courts since then. Zack's argument seems to be that once tolled in 1961, this COGSA provision could never again be a bar to a suit arising out of the original cargo damage claim. The court finds Zack's position wanting both in reason and in support from the case law.

Ore Steamship Corp. v. D/S A/S Hassel, 137 F.2d 326 (2d Cir. 1943)and United States Relief and Rehabilitation Adm. v. The Mormacmail, 99 F. Supp. 552 (S.D.N.Y.1951), cited by Zack, correctly stand only for the proposition that a suit in admiralty is instituted by the filing of a libel, which tolls the COGSA time bar; such a suit will not be dismissed merely be-

because service of process is not effected until after the expiration of the one year period, unless laches, involving undue delay in prosecution and resultant prejudice to the defendant, is shown. See also Howmet Corp. v. Tokyo Shipping Co., 318 F. Supp. 658 (D. Del. 1970); 2A Benedict on Admiralty § 163 at 16-8 (6th ed. 1977). Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514 (4th Cir. 1955) held that where a libel has been timely filed in one federal district court on a cargo damage claim in the anticipation that a vessel will be found there and it is later discovered that the vessel is in another district where the libel could have been filed, the action may properly be transferred even after the running of the statutory period; the rights of the libellant having been preserved against the running of the statute by the institution of the suit, absent laches the interest of justice would be served by the transfer, given that a new proceeding would be time barred. Id. at 516-17. Compare Hugo Stinnis Steel & Metals Co.v. S.S. Elbe Oldendorff ("StinnisII"), 372 F. Supp. 705 (S.D.Ga. 1974) (Where Judge Metzner of this court denied such a motion to transfer what he termed a "stale claim," 363 F. Supp. 1391 (S.D.N.Y.1973), aff'd. mem. 505 F.2d 727 (2d Cir.1974) ("Stin-

nis I"), the court in Georgia held that the pendency of the unserved action in New York did not toll the COGSA limitation period with respect to a distinct untimely suit on the same claim.)

Neither these authorities nor any others the court has discovered support Zack's claim that its rights were preserved through eighteen years by the timely filing of a libelin 1961 and its activities in various courts thereafter. The original action was long ago dismissed for failure to prosecute; had it not been dismissed when it was, it would certainly have been vulnerable to the laches defense by now. Thus, the refusal of the district court in New Jersey to restore the action previously filed there to its calendar five years ago is readily understandable. As well, there are present here no elements which would allow Zack to revive and then amend its original libel filed in the Southern District. Cf. Monarch Industrial Corp. v. American Motorists Ins. Co., supra, at 980-81; compare Unilever (Raw Materials) Ltd. v. M/T Stolt Boel, 77 F.R.D. 384 (S.D.N.Y. 1977).

Even if there were a pending suit elsewhere on the cargo damage claim which for some reason had not been dismissed, the grant of a

transfer to this court at this time could hardly be expected. See Stinnis i, supra. Furthermore, the pendency of such a suit (including, arguably, the German action, in which there has yet to be an execution upon the final decision) would be no basis on which to toll the COGAS time bar to allow a distinct action on the same claim. Internatio-Rotterdam, Inc. v. Thomsen, supra; Stinnis II, supra; see also Froelich v. Petrelli, 472 F. Supp. 756, 760 n.7 (D.Ha. 1979).

The COGAS one-year provision may be waived by an agreed extension of time for a fixed and reasonable period, but then the waiver is effective for that period only. Monarch Industrial Corp. v. American Motorists Ins. Co., supra, at 979; see also International Har e ter Export Co. v. Skibsaktieselskab Hilda Knudsen, 106 F.Supp.880 (S.D.N.Y.1952). There was a written extension of time given to Zack which was found to be binding on Contam Linie and the partners, but not on International, to preserve Zack's right to bring the German action; whether or not the German court was correct in finding that only the charterers were bound by the waiver, by its terms that extension ran from January 15 to May 15, 1961 and no longer.

Finally, there has been no demonstration that

defendants, by their representations, promises or conduct, should be estopped from asserting the time bar after all these years. See Bitchoupan rug Corp. v. A/S Atlas, 1975 A.M.C. 298 (S.D.N.Y. 1975); Austin, Nichols & Co. v. Cunard Steamship, Ltd., 367 F. Supp. 947, 949 (S.D.N.Y. 1973); cf. Rayon y Celanese Peruana v. M/V PHGH, 471 F. Supp. 1363, 1371-72 (S.D.Ala. 1979). The first cause of action may not be maintained.

By the second and third causes of action, Zack seeks to collect from the insurers any damages awarded herein against the charterers and International. The insurers have submitted an affidavit of counsel and attached exhibits (the Rules of Newcastle and London then governing, and the relevant sections of the insurance policies) in support of their argument that they are mutual insurance companies with no direct obligation to Zack, but only liable to indemnify their members for payments made under covered risks. Judging by the language contained in the documents before the court[9] (Zack having offered no contrary evidence), the policies of insurance of the charterers and International in effect at the time Zack's claim arose were indeed indemnity policies, and no liability of the insurers arises until payment is made by the insured to the injured third party on a claim. Ahmed v. American S.S. Owners

Mutual Protection & Indemnity Assoc., Inc., 444 F. Supp. 569, 571 (N.D. Cal. 1978) (applying New York law); Liman v. American S.S. Owners Mutual Protection & Indemnity Assoc., Inc., 299 F. Supp. 106, 109 (S.D.N.Y.), aff'd, 417 F.2d 627 (2d Cir. 1969)(per curiam), cert. denied, 397 U.S. 936 (1970). Therefore, with the first cause of action dismissed, these next two causes against the indemnity insurers must also fail.

The remaining two causes of action are independent from the original cargo damage claim, and so are not necessarily barred. Zack seeks $200,000 damages for alleged fraud committed by the insurers and others associated with these defendants in prior chapters of this litigation in the German courts, in the federal district courts in Virginia and New Jersey, and in the appeals of those trial court decisions.

Specifically, Zack alleges the following acts done intentionally and wilfully "to deceive the courts for the benefit and interest of the insurers to the hurt and detriment of the plaintiff": (1) withholding from the German trial court in 1971 of the fact that the Severn River actually had foundered on rocks and had become a total loss some years before, thus deceiving that court into limiting

execution of judgment as against International, pursuant to German law, to the ship; (2) misrepresentation before the German courts, at trial and on appeal, concerning the written extension of time to sue given to Zack in 1961, leading the appellate court to hold that suit against International was time-barred; (3) misrepresentation before the United States District Court for the Eastern District of Virginia in 1972, and later before the Court of Appeals for the Fourth Circuit, concerning the nature of the limitation placed by the German trial court on execution of judgment against International, causing those two courts to construe that German judgment as in rem and reject Zack's attempt to execute through attachment of another vessel of International in Norfolk; (4) falsely stating to the federal courts in Virginia that the claim against International was time-barred under COGSA; and (6) deceitfully attempting to convince the federal district court in New Jersey to dismiss the action with prejudice against all defendants on the basis that the decision of the German appellate court was res judicata.[10] In addition, by affidavit, letter and in oral argument Zack has accused defendants of perpetrating frauds of a similar nature upon this court.

To defeat suggestions that the seemingly relevant state six-year statute of limitations, New York C.P.L.R. § 213(9)(McKinney 1972), would defeat several of the individual fraud claims, Zack goes to some lengths in its submission in response to the motion to dismiss, to characterize the complained-of activities as component parts of an ongoing twenty-year conspiracy of fraud orchestrated by the insurers - who were not even parties to the prior suits but who allegedly managed the defense ;thereof - to frustrate Zack's attempts to recover the damages to which it is entitled. This argument is beside the point.

Although the fraud cause of action is styled as one for damages against the insurers, it is in reality a collateral attack on the decisions and judgments rendered in the prior actions in Germany and in the United States; the gravamen of the claim necessarily is that the various courts would have rendered decisions favorable, or more favorable, toZack had it not been for the alleged wrongdoing of these defendants and others associated with them. Griffith v. Bank of New York, 147 F. 2d 899, 901 (2d Cir.), cert. denied, 325 U.S. 874 (1945); Cataldo v. Land, 78-2 U.S.T.C. para. 9535 (E.D. N.Y. 1977), aff'd, 78-2 U.S.T.C. para. 9622

(2d Cir. 1978). The cause properly is analyzed under Fe.R.Civ.P. 60(b).[11] See generally Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 86 F.R.D. 131, 135-140 (E.D. Va. 1980). Leaving aside the issues of whether the fraud alleged is properly chargeable to any of the defendants, or whether the allegations are sufficiently particular, this cause of action fails.

Zack terms its claim as one for "fraud upon the court." It is alleged that attorneys for International and for the charterers, who actually were retained by the insurers, consistently misrepresented the applicable law and operative facts in prior proceedings. The claim thus arguably satisfies the requirement that it be of "that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial taks of adjudging cases that are presented for adjudication," 7 Moore's Federal Practice, para. 60.33 at 515 (1979 ed.)(footnote omitted), quoted in Serzysko v. Chase Manhattan Bank, 461 F.2d 699(2d Cir.), cert. denied, 409 U.S. 883 (1972); see Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238

(1944); Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 836-37 (2d Cir. 1980); H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118-19 (6th Cir. 1976); Konigsberg v. Security National Bank, 66 F.R.D. 439, 442 (S.D.N.Y. 1975). As such, Zack is correct in asserting that no part of its fraud claim would be time-barred. Hazel-Atlas Co. v. Hartford-Empire Co., supra, at 246; 7 Moore's, supra, at 509. However, Zack's claim of fraud upon the court(s) may not be litigated here, but must be pressed in the various courts which were allegedly defrauded. Hazel-Atlas Co. v. Hartford-Empire Co., supra, at 246-48; Pfotzer v. Amercoat Corp., 548 F.2d 51, 52-53 (2d Cir. 1977); Notes of the Advisory Committee on Fed.R.Civ.P. 60(b); 7 Moore's, supra, at 505-06.

Alternatively, insofar as Zack has attempted to institute an independent action to set aside the results of the prior proceedings (and to the extent that such a cause would not be barred bylaches, see Moore's supra, at 505), that claim must also fail as a matter of law. Such an independent action has traditionally been sustainable only in cases of extrinsic, as opposed to intrinsic, fraud, United State v. Throckmorton

98 U.S. 61, 68 (1878); in any event, it will not lie where there was an opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action. See Serzysko v. Chase Manhattan Bank, supra, at 702 & n.2; Konigsberg v.Security National Bank, supra, at 442-43. Each instance of fraud alleged here was intrinsic to a prior judicial proceeding; moreover, in each instance the alleged wrongful conduct of defendants in presenting "false" facts and legal arguments to the courts in prior proceedings was raised and considered in the proceeding in question or on appeal therefrom.[12] Such allegations do not form a proper basis for this collateral attack. See Cataldo v. Land, 78-2 U.S.T.C. para. 9535, supra. Zack is not saved in this respect by its bald characterization of defendants' fraudulent conduct as a conspiracy. See Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 421-24 (1923); Moffett v.Robbins, 81 F.2d 431, 436 (10th Cir.) cert. denied, 298 U.S. 675 (1936); 7 Moore's supra, para. 60.37 (1) at 617 n.34; compare Burbrooke Mfg. Co. v. St. George Textile Corp., 283 A.D. 640, 129 N.Y.S.2d 588 (1st Dept. 1954).

Finally, Fed.R.Civ.P. 60(b)(3), which provides for the granting of relief from a final judgment for "fraud (whether heretofore de-

nominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party" cannot be the basis of Zack's claim for a number of reasons, the most obvious of which is that that subsection of the Rule applies only to judgments obtained in the same district court to which application for relief from the fraud is made. See United States ex rel. Aigner v. Shaughnessy, 175 F.2d 211 (2d Cir. 1949); 7 Moore's, supra, para. 60.28(1) at 387.[13]

The fourth cause of action, asserting Newcastle's failure to honor its guarantee of satisfaction of the final German decision granting Zack $33,000 plus interest and part of costs, remains. Newcastle offers no basis for the court to dismiss this claim of Zack, but argues first that the guarantee has not become due because the decision of the German appellate court has not been reduced to judgment, and second, that even if it has, Newcastle holds a validlien on part of the award due Zack. Questions of fact and law are thus presented hich cannot be resolved at this stage. On this cause of action against Newcastle, and this alone, the case will be placed on the non-jury ready trial calendar on March 16, 1981.[14] Zack and Newcastle will submit a revised pre-

trial order and briefs before that date. The remainder of the complaint is hereby dismissed.

IT IS SO ORDERED.

DATED: New York, N.Y.
February 18, 1981

Robert W. Sweet
U.S.D.J.

FOOTNOTES

1. Contam Linie apparently is no longer in existence. Defendants Hans H. Jansen ("Jansen") and Jurgen K. Krafft ("Krafft") (collectively "the partners") were the partners in Contam Linie.

2. The steel apparently was delivered by the Severn River to a point in New Jersey, after which it was transferred by separate means to Zack's custody at a pier in New York. International presses this point in arguing that this court has no personal jurisdiction over it. However, given the court's disposition of the action, the matter need not be further addressed.

3. This was the finding of the United States District Court for the Eastern District of Virginia (as reflected in the decision on appeal) which had before it the same "agreed translation" of the German decision in question (dated December 7, 1971) as does this court. See M.W. Zack Co. v. International Navigation Corp., 510 F.2d 451 (4th Cir.), cert. denied, 423 U.S. 835 (1975). Zack here disputes the characterization of that judgment as in rem; in view of the superseding determination of the German appellate court, see infra, and this court's disposition of the instant action, this matter need not be further addressed.

4. The two opinions on appeal, in the action captioned M.W. Zack Metal Co. v. Federal Insurance Co., are reported at 26 A.D.2d 54, 271 N.Y.S.2d 1 (1st Dep't. 1966) and 28 A.D.

2d 1109, 284, N.Y.S.2d 582 (1st Dep't. 1967).

5. In February , 1970 Zack apparently commenced an action against the insurers for fraud in purchasing this interest of Federal. Zack represents that that action is still pending. By affidavit of counsel dated January 12, 1981, Zack seeks to amend the fifth cause of action of its complaint herein to include the alleged fraud which is the subject of the state action. Zack may not so effect an amendment of its complaint. In any event, such an allegation of fraud would be time-barred. New York C.P.L.R.§ 213(9)(McKinney 1972).

6. Whether the decision of the German appellate court of January 9, 1975 in fact constitutes a judgment which Newcastle must satisfy pursuant to the guarantee it signed, is at issue with respect to Zack's fourth cause of action herein. See infra.

7. It has been extremely difficult to reconstruct the history of this litigation, perhaps for the very reason that in its course the parties have submitted volumninous motions, memoranda, affidavits and correspondence, not all of which have been succinct and germane.

8. This court has not accepted Zack's attempts to serve International, nor has Zack presented the court with authority for the proposition that International's contacts with New York provide the basis for the court's asserting personal jurisdiction over it. As the court's disposition of the case dismisses International as a defendant on other grounds, the jurisdictional matter need not be further addressed.

9. Rule 4 of the Newcastle Protection and Indemnity Association for 1959 reads, in pertinent part:

> Subject to the provisions of these Rules, a Member shall be protected and indemnified against all or any of the following claims and expenses which he shall become liable to pay and shall in fact have paid in respect of a ship entered in the Association....

Rule 6 of The London Steam-Ship Owners' Mutual Insurance Association, Ltd. for 1959-60 reads, in pertinent part:

> Provided always that in the case of a liability actual payment (which shall be made out of moneys belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liability shall, unless the Committee otherwise decide, be a condition precedent to the right of the Member to recover and the obligation of the Association to satisfy and make good.

Nothing before the court indicates that either of the policies contained any special provision to the contrary.

10. See also note 5.

11. Fed.R.Civ.P. 60(b) provides, in pertinent part:

> On motionand upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> ...

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party....

...
The motion shall be made within a reasonable time, and .. notmore than one year after the judgment, order, or proceeding was entered into or taken.

...
This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding ... or to set aside a judgment for fraud upon the court.

12. Consideration of the one possible exception in this respect, the alleged withholding from the German trial court of the plight of the Severn River, was rendered moot in any event by the subsequent decision on appeal, which dismissed outright the case against International on a different ground.

13. Zack does not argue that any of the fraudulent conduct alleged should be attributed to any of its adversaries in the prior proceedings - that is, to the defendants other than the insurers. See 7 Moore's, supra, para. 60.24(5) at 290-91. This cause of action names only the insurers who are alleged to have engaged in fraudulent behavior through attorneys retained to defend in the previous suits against International and the charterers.

If this claim of Zack's be taken strictly on its own terms, with the insurers committing frauds as independent third parties to prior proceedings, the Rule 60(b) analysis

shifts only in that fraud which when committed by an adverse party in the prior proceeding is pigeonholed under Rule 60(b)(3) must be considered instead under Rule 60(b)(6). See e.g., McKinney v. Boyle, 404 F.2d 632, 634 (9th Cir. 1968), cert. denied, 394 U.S. 992 (1969); 7 Moore's supra, para. 60.24(5) at 291. Zack is precluded from utilizing subsection (6), just as it is precluded from utilizing subsection (3), because the fraud challenge has not been brought in the district court in which the fraud was allegedly committed (and additionally, where relevant, because of the one-year-from-date-of-judgment time bar applicable explicitly to Rule 60(b)(3) and implicitly to Rule 60(b)(6). Serzysko v. Chase Manhattan Bank, supra, at 701-02.) Otherwise, with respect to fraud upon the court as well as the independent action in equity, the analysis is unchanged. See id. at 291-92. Moreover, this analysis leads inexorably to the same conclusion--i.e., that the fifth cause of action must be dismissed--even if the complaint should be read liberally to allege fraud against the other defendants as well.

14. There has been a dispute as to whether Zack is entitled to and/or has demanded a trial by jury on some or all of the causes of action. Fed.R.Civ.P. 38. Whether or not Zack made such a timely demand with respect to some of the causes and defendants, there has been no showing that any demand was ever made on Newcastle, the only defendant before the court on the fourth (and sole remaining) cause of action - or indeed that any demand was made in connection with or at about the time of the filing of the original complaint. Therefore, even if Zack would have been entitled to a jury trial against Newcastle on this cause, it has waived that right.

SAME CAPTION

Decision of J. Sweet at conclusion of Plaintiff's case dismissing fourth cause of action.

With respect to the motion to dismiss the plaintiff's case for failure to make out a prima facie case, that motion is granted.

This case has throughout been an extremely difficult one and the effort maintains to try to do substantial justice.

The exhibits presented to me indicate that in 1971, November 29, the defendants entered a guarantee or signed a guarantee and the language of the guarantee is to pay upon first request the agreed sum plus interests and costs in the amount to which the plaintiff is entitled pursuant to a final decision of the German courts or on the basis of a settlement.

The guarantee also refers to the judgment of the German trial court which required the defendants -- which determined that the defendants were entitled to $64,017.63 -- plaintiffs were entitled to recover $64,018.03 plus interest since February 10, 1960.

Also introduced in evidence, though I must confess that the evidentiary submission was not in accordance with Rule 41, if that is the right rule, nonetheless the -- I am sorry, Rule 44 -- was not in accordance with Rule 44, but

nonetheless the ;judgment has been admitted, that is, the ;judgment of June 15, 1971 in the German court.

Further, there has been admitted what purports to be and apparently is a determination by the Hanseatic Provincial Court. That is Plaintiff's Exhibit 3.

It is evident from that document that an appeal was taken and I think the proof here establishes that an appeal was teken from the trial court determination, and the appellate court, as has been indicated by both counsel, reduced the judgment to an amount in the neighborhood of $33,000.

From these documents it is apparent that something is owed to the plaintiff by the defendants and of that there can be no question.

However, this is a court of law. The guarantee speaks in terms of a final judgment, final dceision and there has been no evidence submitted to this Court as to what the amount of that final judgment is.

It may well be that the determination of the Hanseatic Provincial Court is in fact a final judgment, but no evidence has been submitted and no briefs have been submitted, no German law has been submitted to substantiate that proposition.

Indeed there has been testimony here that

the matter of costs and fees has not been finally determined in the German courts.

For these reasons, therefore, I find it necessary, despite the clear implication of these documents, that is, that money is owed by the defendants to the plaintiff, despite that, I am unable to -- despite that I am compelled to grant the motion to dismiss for failure to establish the amount, the entry of or the amount of a final judgment in the German courts.

It should go without saying under these circumstances that this dismissal is without prejudice.

Now, do you press your counterclaim, Mr. Allen?

MR. ALLEN: Yes, your Honor, I do.

THE COURT: Tell me what you want to do.

MR. CATALDO: Your Honor said you were going to go ahead only on the fourth cause of action. I am not prepared to try --

THE COURT: No, we are going forward.